TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

SAMUEL SPEVACK, PETITIONER,

vs.

SOLOMON A. KLEIN.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JANUARY 26, 1966
CERTIORARI GRANTED MARCH 21, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 944

SAMUEL SPEVACK, PETITIONER,

vs.

SOLOMON A. KLEIN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

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[fol. A]

IN THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

EXHIBIT 2791

THE PEOPLE OF THE STATE OF NEW YORK

To Samuel Spevack
66 Court Street
Brooklyn, N. Y.

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, at an ADDITIONAL SPECIAL TERM OF THE SUPREME COURT FOR THE COUNTY OF KINGS, at Room Number 301, 3rd floor, Borough Hall, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 12th day of June, 1958, at 10:00 o'clock, in the forenoon, and at any adjourned date to testify and give evidence in a certain proceeding now pending in the said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated January 21, 1957, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid, the following records pertaining to your business as an attorney for the period January 1, 1953 through December 31, 1957:

1. Day Book (reflecting daily receipts; 2. Cash Receipts Book; 3. Cash Disbursements Book; 4. Check Book Stubs; 5. Petty Cash Book; 6. Petty cash vouchers; 7. General Ledger and General Journal; 8. Cancelled checks, bank statements, duplicate deposit slips of regular and special checking accounts, open and closed; 9. Pass books and evidences of accounts, other than checking accounts, with all

depositories, such as savings banks, savings and loan associations, postal savings, credit unions, etc.; 10. Record of all loans made from financial institutions and others, open and closed; 11. Payroll records consisting of (a) Payroll Book, (b) Social Security and Withholding Tax Returns; 12. Copies of Federal and State Income Tax Returns and accountants' work sheets relative thereto, now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court, and liable to pay all damages sustained thereby and forfeit FIFTY DOLLARS in addition thereto.

WITNESS, HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of said Supreme Court, presiding at the said Additional Special Term thereof, at said Borough Hall, Court and Joralemon Streets, Borough of Brooklyn, City and State of New York, on the 2nd day of June, 1958.

JOSEPH B. WITTY
Clerk

DENIS M. HURLEY
Counsel for the Judicial Inquiry
Room 301, 3rd Floor
Borough Hall
Court and Joralemon Streets
Brooklyn 1, New York

IT IS HEREBY STIPULATED that, the above matter having been adjourned to the day of 195 , the undersigned Witness is hereby excused from attending on said date but agrees to remain subject to the call of the Counsel for the said Judicial Inquiry.

Dated: 195 .

.....
Witness

.....
Counsel for the Judicial Inquiry

[fol. B]

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

Present—Hon. George J. Beldock, Presiding Justice, Hon. Henry L. Ughetta, Hon. Philip M. Kleinfeld, Hon. Marcus G. Christ, Hon. Arthur D. Brennan, Justices.

IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS AT LAW AND BY OTHERS ACTING IN CONCERT WITH THEM, IN THE COUNTY OF KINGS.

ORDER DESIGNATING COUNSEL—Entered January 2, 1963

An order having been made by this court on January 21, 1957, directing a judicial inquiry and investigation as to the matters set forth in the petition of the Brooklyn Bar Association, and this court having designated Mr. Justice Edward G. Baker, effective January 2, 1959, to conduct such inquiry and investigation in place of Mr. Justice George A. Arkwright, retired, and having designated Mr. Denis M. Hurley, an attorney and counselor at law to aid said Justices in the conduct of such inquiry and investigation, and it appearing that the said Mr. Justice Edward G. Baker has taken testimony and filed in this court an intermediate report, dated December 21, 1962, relative to the following attorney:

Samuel Spevack,

and pursuant to Section 90 of the Judiciary Law, it is

Ordered, that Solomon A. Klein, Esq., an attorney, is hereby designated and directed to institute in this court disciplinary proceedings against the above named attorney, Samuel Spevack (admitted 2nd Dept. March 3, 1926), based on his misconduct as indicated in the aforesaid intermediate

report of Mr. Justice Edward G. Baker, and as indicated in the evidence and exhibits adduced in said judicial inquiry and investigation, or any other evidence that may be [fol. C] available, and that such disciplinary proceedings be instituted and prosecuted as soon as may be practicable.

Enter:

George Beldock, Presiding Justice.

[fol. E]

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

In the Matter of

Samuel Spevack, Attorney-Respondent.

PETITION OF SOLOMON A. KLEIN—July 8, 1963

To the Honorable Presiding Justice and Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department:

The petition of Solomon A. Klein respectfully alleges:

1. That by order of this Court, dated and filed January 2, 1963, petitioner was duly designated and directed to institute in this Court disciplinary proceedings against the respondent, Samuel Spevack, as an attorney and counselor-at-law, based upon his misconduct as an attorney and counselor-at-law as set forth in the report of Hon. Edward G. Baker, a Justice of the Supreme Court of the State of New York, presiding at the Additional Special Term, Kings County, filed with the Clerk of this Court, dated December 21, 1962, and as indicated in the evidence and exhibits presented before the Additional Special Term, Kings County, or any other evidence that may be available, in a proceeding established by order of this Court dated Janu-

ary 21, 1957, as amended by order dated February 11, 1957, all as more fully hereinafter described.

2. That the said order of January 2, 1963 was duly made and filed by this Court in the proceeding established by the said order of January 21, 1957, as amended by order dated February 11, 1957, which is entitled, "IN THE MATTER OF THE PETITION OF THE BROOKLYN BAR ASSOCIATION FOR A JUDICIAL INQUIRY BY THE COURT INTO CERTAIN ALLEGED [fol. F] ILLEGAL, CORRUPT AND UNETHICAL PRACTICES AND OF ALLEGED CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, BY ATTORNEYS AND COUNSELORS-AT-LAW AND BY OTHERS ACTING IN CONCERT WITH THEM IN THE COUNTY OF KINGS," (hereinafter called "Judicial Inquiry").

3. Upon information and belief that the respondent Samuel Spevack was admitted to practice as an attorney and counselor-at-law in the courts of the State of New York by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, in March 1926, and has ever since acted as such attorney and counselor-at-law.

4. Upon information and belief, that the respondent Samuel Spevack, resides in the County of Kings, State of New York, and that at all times hereinafter mentioned he was an attorney practicing law with an office in the County of Kings, State of New York.

5. Upon information and belief, that during the course of a judicial inquiry and investigation that was directed to be made by the aforesaid order dated January 1, 1957, the respondent Samuel Spevack in response to a subpoena duces tecum, dated June 2, 1958, served upon him, appeared before Mr. Justice George A. Arkwright, then presiding at the Additional Special Term of this Court, on June 12, 1958. At the request of said respondent, the said Samuel Spevack was granted several adjournments to June 26, 1959 when the said Samuel Spevack appeared before Mr. Justice Edward G. Baker presiding at the Additional Special Term of this Court.

6. Upon information and belief, that on June 26, 1959, the said respondent Samuel Spevack was duly sworn as a witness and was directed to produce the records required to be produced by him pursuant to said subpoena duces tecum and the said respondent Samuel Spevack refused [fol. G] to produce any of the particular records enumerated in the said subpoena duces tecum upon the ground that the production of such records might tend to incriminate or degrade him or subject him to some penalty or forfeiture.

7. Upon information and belief, that thereafter and on or about the 26th day of June, 1961, the respondent Samuel Spevack requested that he be permitted to appear before the Justice presiding at the Additional Special Term, Kings County, to testify and to produce the books and records required by the said subpoena duces tecum.

8. Upon information and belief, that pursuant to the foregoing request, the respondent Samuel Spevack appeared on January 10, 1962 as a witness before the Justice presiding at the Additional Special Term. Except for his acknowledgment of due service upon him of a subpoena duces tecum in June, 1958, respondent Samuel Spevack refused to answer any of the questions that were then asked of him and respondent Samuel Spevack further refused to then produce the financial records required of him to be produced by the said subpoena duces tecum, claiming his Constitutional privilege against self-incrimination. The respondent Samuel Spevack was then apprised of the possible serious consequences that might flow from his refusal to answer the questions that were propounded to him; that his failure to answer might give rise to disciplinary action. Respondent Samuel Spevack was further apprised of the controlling case law and in particular of the decision of the United States Supreme Court in *Cohen* v. *Hurley*, 366 U.S. 117, affirming 9 App. Div. 2nd 436, affirmed 7 N.Y. 2nd 488, *sub. nom.*, *In the Matter of Albert Martin Cohen, an Attorney*, pertinent statutory provisions

of the Penal Law and particular Canons of Ethics, but the respondent Samuel Spevack persisted in his refusal to give testimony and persisted in his refusal to produce his finan-
[fol. H] cial records required of him to be produced by the subpoena duces tecum as aforesaid.

9. Upon information and belief, that thereafter and on the 9th day of July, 1962 the respondent Samuel Spevack again appeared as a witness before the Justice presiding at the Additional Special Term, Kings County, and on said day the respondent Samuel Spevack again refused to produce his financial records required by him to be produced by the said subpoena duces tecum upon the ground that to answer the questions or to produce such financial records might tend to incriminate or degrade him or subject him to a forfeiture or a penalty and upon the additional ground that to require him to produce such financial records would be violative of the Fourth Amendment to the United States Constitution and Article 1, Section 12 of the Constitution of the State of New York.

10. Upon information and belief, that the respondent Samuel Spevack has been guilty of professional misconduct and conduct prejudicial to the administration of justice in his office as an attorney and counselor-at-law, in that:

(A) The refusal of the respondent Samuel Spevack to produce the records set forth in the subpoena duces tecum alleged in paragraph "5." above and his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his

refusal to answer the aforesaid questions the respondent [fol. I] hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession.

(B) That in addition to and wholly apart from respondent's repeated refusal to testify and to produce his financial records, the said respondent Samuel Spevack wilfully and contumaciously obstructed and impeded the Additional Special Term by a course of conduct deliberately calculated to delay and mislead the Court sitting at such Additional Special Term, by his deliberate failure to appear on various adjourned dates and by authorizing and instructing counsel appearing on behalf of respondent at the Additional Special Term to make and give statements, representations and information to the Court, which statements, representations and information were untrue, whereby both the Court and counsel for respondent Samuel Spevack were deceived.

(C) During the period 1953 to date, the respondent Samuel Spevack has failed to file statements with this Court regarding retainers accepted by him to perform services in connection with personal injury and property damage claims on a contingent-fee basis.

(D) During the period 1953 to date, the respondent Samuel Spevack filed with the Appellate Division of the Supreme Court, Second Judicial Department, statements of retainer pursuant to the Special Rules of the Appellate Division, Second Judicial Department, which said statements of retainer set forth statements made by the said respondent to be false and untrue and thereby said respondent Samuel Spevack practiced a deceit on this Court.

(E) During the period 1953 to date, the respondent [fol. J] Samuel Spevack commingled clients' monies with his own.

(F) During the period 1953 to date, the respondent Samuel Spevack failed to keep proper books and records of his financial transactions with his clients.

(G) During the period 1953 to date, the respondent Samuel Spevack failed to submit to clients upon the closing of cases, statements in writing setting forth the amounts received and separately specifying the sums due respondent for services and disbursements.

(H) That during the period 1953 to date, the respondent Samuel Spevack prepared and served bills of particulars in actions in which he was the attorney, which bills of particulars contained false and exaggerated claims, the falsity of which was known or should have been known to the said respondent.

(I) That during the period 1953 to date, the respondent Samuel Spevack has divided fees received by him in contingent negligence matters with attorneys who had forwarded such contingent negligence matters to him but who did not actually perform legal services or share responsibility in such cases.

(J) That during the period 1953 to date, the respondent Samuel Spevack individually, and in concert with other attorneys, violated the Canons of Professional Ethics by representing conflicting interests.

11. That respondent Samuel Spevack knew or should have known in committing the acts aforesaid, he was violating applicable statutes of the State of New York, the Canons of Professional Ethics adopted by the New York State Bar Association January, 1909, as amended, the Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the Second Judicial Department, Section 273 of the Penal Law, and his inherent duty as an attorney and counselor-at-law.

[fol. K] 12. That no previous application has been made for the relief herein asked.

13. That the sources of petitioner's knowledge and the grounds of his belief are the facts in evidence set forth in the testimony and exhibits taken and adduced before the Hon. Edward G. Baker in said Judicial Inquiry conducted by him, and in the said report of Hon. Edward G. Baker filed with the Clerk of this Court and dated December 21, 1963.

14. That an order to show cause is asked for herein, instead of service of a notice of motion, in order that the Court may be fully apprised of the charges made against the respondents in advance of the service thereof upon them, and to enable the Court to fix the return date of the order to show cause, all in accordance with the practice observed in such matters.

Wherefore, petitioner prays that an order may issue to the respondent Samuel Spevack, directing that he show cause before this Court why an order should not be made herein directing that he be disciplined upon the charges set forth herein, and for such further action as may be contemplated by Section 90 of the Judiciary Law of the State of New York, in accordance with the practice directed to be observed in the disposition of such matters by the courts of this State.

Dated: Brooklyn, New York, July 8th, 1963.

Solomon A. Klein, Petitioner.

[fol. L] *Duly sworn to by Solomon A. Klein, jurat omitted in printing.*

[fol. M] Affidavit of Service (omitted in printing).

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

In the Matter of Samuel Spevack,
Attorney.

SOLOMON A. KLEIN, Petitioner,

—against—

SAMUEL SPEVACK, Attorney-Respondent.

Excerpts From Transcript of Proceedings

Brooklyn, New York
June 2, 1964.

Before:

Hon. Harold F. McNiece, Referee.

APPEARANCES:

Solomon A. Klein, Esq., Petitioner Pro Se.

Messrs. Shatzkin and Cooper, Attorneys for Respondent, Bernard Shatzkin, Esq., of counsel.

Milton Friedman, Official Reporter.

[fol. 2]

OFFERS IN EVIDENCE AND COLLOQUY THEREON

Mr. Klein: May it please your Honor, as a result of conversations had with counsel—

The Referee: Excuse me. Off the record.

(Discussion off the record.)

The Referee: We will now go on the record, and I will open the hearing. Let the record show that this hearing is

being held pursuant to an order of the Appellate Division of the Supreme Court, Second Judicial Department, made and filed the 23rd of September, 1963, appointing me as a Referee to hear and report in the matter of Solomon A. Klein, Petitioner, and Samuel Spevack, attorney-respondent.

First, I would like to offer in evidence the Referee's oath and ask that it be marked Referee's Exhibit I.

(Received in evidence and marked Referee's Exhibit I).

(Handed to Mr. Klein.)

Mr. Klein: Fine.

(Handed to Mr. Shatzkin.)

The Referee: Is the petitioner ready?

Mr. Klein: Yes, your Honor.

• • • • • • • •

[fol. 3] Mr. Klein. Yes. I first offer in evidence the respondent's statements of retainer filed with the Appellate Division for the following years: For the year 1953, 119 statements of retainer; the year 1954, 150; the year 1955, 154; for the year 1956, 157; for the year 1957, 155; for the year 1958, 143; for the year 1959, 129; and for the first six months of the year 1960, 55; making a total of 1,053 statements of retainer during the years that I have mentioned.

The reason, your Honor, for the six-month period in 1960 is that after that six-month period subsequent statements of retainer have to be filed with the Judicial Conference, and at the time of the investigation of this matter they had gone up only to the first six months of 1960.

• • • • • • •

[fol. 6] (Received in evidence and marked Petitioner's Exhibit 1.)

• • • • • • •

Mr. Shatzkin: Well, may I inquire what the purpose of the offer is then?

Mr. Klein: The purpose—my sole purpose of the offer is to show the extent and nature of the respondent's practice—namely, that he was engaged to a substantial extent in the practice of personal injury and property damage cases on a contingent fee basis.

Mr. Shatzkin: We are ready to concede that that is the fact.

* * * * * * *

[fol. 8] Mr. Klein: I will now state for the record what I had said off the record—namely, that petitioner is limiting the presentation of his proof under the petition to all allegation down to and including paragraph 10-B of the petition and will offer no evidence as to paragraph C—let me put it this way—I am sorry—paragraph C of paragraph 10, paragraphs D, E, F, G, H, I and J.

Now, with reference to the charges upon which proof will be offered by petitioner, I now offer in evidence the stenographic transcript of the proceedings had with respect to the inquiry into the conduct of the respondent, Samuel Spevack, before the Additional Special Term of the Supreme Court of Kings County in charge of the Judicial Inquiry.

The Referee: Any objection?

Mr. Shatzkin: No objection. And I do understand, sir, that I may have a copy of this upon payment of the appropriate stenographic fees, if I should so desire it.

Mr. Klein: Yes, certainly.

[fol. 9]

OFFERING, RECEIVING AND READING INTO RECORD, PETITIONER'S EXHIBIT 2

The Referee: Received as Petitioner's Exhibit 2.

Mr. Klein: I am turning this over to the court stenographer with the request that it be transcribed into the record.

(Received in evidence and marked Petitioner's Exhibit 2.)

(Petitioner's Exhibit 2 is as follows:

June 12, 1958.

Mr. Donlan: The next witness is Samuel Spevack.

(Mr. Spevack enters the courtroom.)

Mr. Donlan: Your Honor, I had sent a request to Mr. Samuel Spevack of 66 Court Street, calling for the production of his records, his financial records, relative to his business as an attorney, for the period from January 1, 1953, through December 31, 1957.

I had spoken to Mr. Spevack on the phone. He indicated he had a request to make of you this morning.

The Court: Mr. Spevack, good morning.

Mr. Spevack: Your Honor, I have tried to reach Mr. Donlan now for several days. I have been over at the pretrial sessions now since they started and before they [fol. 10] started. We don't get out until almost 6:00 o'clock. Every day I get in the office later. I have an associate helping me. These cases are going on today, day after day. They have been adjourned now for next week and the week following.

The Court: When is that call over, Mr. Spevack?

Mr. Spevack: The call officially is over today, but there have been adjournments down until—I had one this morning as late as June 23rd. I have them down for the 24th and 25th, as late as yesterday.

Now, whether you have one case or ten cases, you don't know whether you get out at a quarter to 6:00 or not. I have been getting out very late every night.

The Court: What is the situation now?

Mr. Donlan: Your Honor, we have asked—

The Court: Is Mr. Spevack called as a witness this morning?

Mr. Donlan: I indicated to him, your Honor, that I wanted his books this morning and as I said to you, he told me on the phone—

The Court: It is just on books. You don't want him to testify this morning?

[fol. 11] Mr. Donlan: I don't want him to testify particularly this morning. I would like if Mr. Spevack would state whether he is going to produce his books. Whether he produces them today or tomorrow is not of the essence.

The Court: What period are you asking for?

Mr. Donlan: From January 1, 1953, through December 31, 1957. It is really the years of 1953, 1954, 1955, 1956 and 1957.

The Court: What do you say to that, Mr. Spevack?

Mr. Spevack: To what, sir?

The Court: Mr. Donlan wants you to submit, if you will, to the accounting staff, your books for 1953, 1954, 1955, 1956 and 1957.

Mr. Spevack: Your Honor, I have already said I have been trying to get through my records. I have many, many checks—

The Court: Haven't you got some of them that could be brought over?

Mr. Spevack: That would not be fair, your Honor, if I can't get all of them together.

The Court: You will submit them?

Mr. Donlan: That is the question I ask.

[fol. 12] Mr. Spevack: Let me say this also in utter frankness, your Honor—

The Court: That is what we want.

Mr. Spevack: When Mr. Donlan called me before he sent the subpoena over, I told him what the pre-trial problems were. He said, "If you need an adjournment, there would be no difficulty in getting one." I think those were his words in substance. Since then—I think he telephoned me on June 2nd—since that time, as I have already explained to your Honor, the position across the street.

The Court: I understand that.

Mr. Spevack: I have made some efforts to get at some of my canceled checks, vouchers and other personal records, because I have had business transactions.

The Court: If it would simplify matters, why can't we take some of the years at a time—

Mr. Spevack: I don't have them in that fashion.

Mr. Donlan: Your Honor, I would like, if Mr. Spevack is in a position to do so, to have him say whether he will produce his books. I am not insisting to get them today, tomorrow or the day after.

[fol. 13] The Court: Will you produce your books?

Mr. Spevack: I also have not had an opportunity to confer with myself or with counsel in respect to the position that I should take.

The Court: Are you going to have counsel?

Mr. Spevack: I don't know. After receiving the communication from the Committee over at the Bar Association—

The Court: In the absence of your statement that you are undecided, I suppose the answer is you can't tell at this time.

Mr. Spevack: Yes, we received a communication from the Bar Association Committee, I think, a week ago. I barely had a chance to glance at it. I don't know what position I will take or should take or that the Bar should take—

Mr. Donlan: What has the Bar got to do with this, Mr. Spevack? I don't understand that, for the record.

Mr. Spevack: I have engaged, your Honor, in the course of my 30-odd years of practice, in private business ventures. Some were sound, some not sound. The moneys that were drawn in respect to those ventures were all taken from my [fol. 14] shares of the fees and the records must necessarily be intermingled. I have never kept a bookkeeping system all my life.

The Court: If they are intermingled, of course—

Mr. Spevack: In this sense, your Honor: I have always had more, so much more than my shares of the fees in the special account that I am proud to say that Mr. Love one day said to me in the bank, "You are one of our best depositors here." So I have never mingled my funds with clients' funds in the sense that I deposited checks received in a special account.

The Court: Where are those records that you are required to keep under Rule 4?

Mr. Spevack: Sir?

The Court: Where are the records you are required to keep under Rule 4, which is the rule requiring you to have set up a special account?

Mr. Spevack: They are in my check book.

The Court: Why can't those be produced?

Mr. Spevack: I am trying to say, your Honor, that the years 1953 to 1957, I moved my apartment in April of 1957. I have never had what you call a bookkeeping system as [fol. 15] such. Some of them were home, some of them were in the office, and I had not had complete opportunity just for lack of physical time.

I have also had this. My 1955 records have been examined by—they are going over my 1955 records, the Internal Revenue. They are being checked. I have had to get a lot of stuff for them. There just aren't enough hours in the day right now to get them.

COLLOQUY RE ADJOURNMENTS

The Court: I will give you a short adjournment so that you can kind of assemble your thoughts and assemble your books and see where you are. This call, this calendar call, you say is over tomorrow?

Mr. Spevack: The cases are being adjourned.

The Court: If we give you a week, that is plenty of time.

Mr. Spevack: Your Honor, I would say on Monday we already have five cases.

The Court: This is going to come ahead of that, I am afraid.

Mr. Donlan: Your Honor, if I might—

The Court: You have to make a choice and, of course, this investigation will come ahead of settlements.

[fol. 16] Mr. Spevack: It is not settlements.

The Court: Whatever they may be. They are usually settlements over there. There are no trials.

Mr. Donlan: Your Honor, my concern here is not whether I get the books or the Judicial Inquiry gets the books tomorrow or the next day, but we know from past experience that—and this is no reflection on Mr. Spevack—but lawyers have come in and said they couldn't get their books together and so forth, and three or four months later they finally come in and state their position. It is my opinion that it shouldn't take any lawyer three or four months to decide whether or not he is going to produce his books.

I can appreciate Mr. Spevack's position that if his books are a bit here and there, as he indicated, a little bit upset and so forth, I can understand it might take him a little while to get them together, but I don't think it should take any man too long to decide whether he is going to produce his books.

That is the main question I would like to raise this morning. When he produces them, I am prepared to take them three weeks from now if he says he is going to produce [fol. 17] them.

The Court: You want to know now whether he will produce them or not?

Mr. Donlan: Yes; if he can't answer now, I would like to get an answer as soon as he can give us an answer.

The Court: We are waiting for your answer.

Mr. Spevack: I am trying to deliberate, your Honor.

The Court: I assume you have nothing to hide, so why shouldn't you bring them in?

Mr. Spevack: I say this, Judge: I have many private business ventures in the years that I have been in practice, and they are asking for the checks that were drawn for those that come out of funds which were in the special account.

As I said before, the account has always been more than adequate to supply any funds which the clients were entitled to.

The Court: That doesn't answer the question. The question is, Are you going to produce the books or will they have to be subpoenaed? That is what it comes down to.

[fol. 18] Mr. Spevack: I must ask for some time to deliberate on that, your Honor.

The Court: I don't think it requires much time. How much time do you want to deliberate on it?

Mr. Spevack: I would say in light of personal problems, I would say two weeks.

The Court: No, no. I will give you until Tuesday morning and you may then come in and give us your answer.

Mr. Donlan: At that time, your Honor, if it pleases you, I would like Mr. Spevack to take the stand. I am going to put him on notice that we are going to ask him to take the stand.

The Court: 10:00 o'clock Tuesday, June 17th.

Mr. Spevack: May I say this, as I tried to get Mr. Donlan following his original conversation with me, if I had known that it would be so precipitate, that I would have had to drop anything, I would have tried to consult with myself this last week, something which I did not feel that there had been any urgency to do, because as he told me on June 2nd, "If you will require any additional time, there should be no problem in getting it." And I have tried to get him [fol. 19] since Tuesday. I have made several phone calls to try to reach him.

The Court: This is Thursday and Tuesday gives you plenty of time to decide whether you will produce the books or not.

Mr. Spevack: All right.

The Court: I think you could decide that—I know I could—in ten minutes. I wouldn't even need ten minutes. I could decide it immediately.

Tuesday, at 10:00 o'clock.

(Mr. Spevack leaves the courtroom.)

June 17, 1958.

(Mr. Spevack enters the courtroom with his attorney.)

The Court: Good morning, Mr. Spevack.

Mr. Berman: David T. Berman, 26 Court Street, Brooklyn.

The Court: You are appearing for Mr. Spevack?

Mr. Berman: Yes, your Honor.

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[fol. 21] Mr. Donlan: Your Honor, what Mr. Berman says is true about advising me yesterday. He did come over and I spoke to him. I have no objection to adjourning it until 10:00 A.M. on the 24th of June, at which time we trust Mr. Spevack or his attorney, or both, will have some statement as to their position relative to the records. That is the only concern I have, is that on that date they will give us a statement as to Mr. Spevack's position.

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[fol. 22] Brooklyn, New York, Tuesday
June 24, 1958.

Mr. Donlan: Your Honor, this is the matter of a subpoena served on Samuel Spevack, attorney, represented by Mr. Berman, who appeared here on the 17th.

Mr. Berman:

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In this particular instance I have an application pending before the Appellate Division for relief as against the subpoena issued herein.

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[fol. 24] The Court: This will be adjourned without date.

Mr. Berman: Thank you very much.

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[fol. 25] November 14, 1958.

Your Honor, I would like to add to the calendar, if I may, an attorney who is outside, an attorney for the Chemical Corn Exchange Bank at 50 Court Street, who is here with Mr. Love of the Chemical Corn, in answer to a subpoena duces tecum served on them, substantially requesting the

transcripts of accounts of Samuel Spevack, an attorney, with the Chemical Corn Exchange Bank.

I believe the attorney for the bank has a request for an adjournment due to a necessity of needing more time to get these records.

In this connection, an attorney named David T. Berman, who represents Samuel Spevack, I understand, to say something relative to that.

The Court: We will ask the attorney for the bank to come in.

(Hamilton Love, vice-president of the Chemical Corn Exchange Bank, and Maxim Buchwalter, attorney for the bank, both enter the courtroom.)

The Court: Mr. Buchwalter, you have an application, have you?

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[fol. 28] Mr. Buchwalter: Do you want the checks charged against the accounts?

Mr. Donlan: My answer to that is that there are checks that were drawn on the bank, we want them if you have them, cashier's checks. Did you make records of checks that were drawn on the bank?

Mr. Buchwalter: Drawn by the depositor?

Mr. Donlan: Yes.

Mr. Buchwalter: We have a record of those checks.

[fol. 29] Mr. Love: If you ever try to get them, you will find it is difficult.

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[fol. 30] Mr. Love: There is one question there. Our client objects to our delivering any records without an order of the court.

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The Court: I will take that up with him.

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[fol. 31] Mr. Donlan: Your Honor, I would like the bank, if they would, to proceed to get these records and not wait.

The Court: We may as well have a test case on that.

Mr. Buchwalter: Your Honor, may we be present while Mr. Berman appears before you?

The Court: I have no objection. I don't want you to join in the discussion.

Mr. Buchwalter: We won't join. As far as we are concerned, we are going to get the records ready for you.

The Court: However, you know, this is a secret investigation and you are not supposed to be knowing what is going on. Maybe I had better not let you be here while he is speaking. I don't know what he will speak about. I assume I know who he is representing, but I am not sure, nor do I know that that is what he is going to speak about. [fol. 32] Inasmuch as it is a secret investigation, maybe I had better let you wait outside and then when it is over, have you come in and let you know the disposition of it.

(Mr. Love and Mr. Buchwalter leave the courtroom.)

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The Court: Good morning, Mr. Berman.

Mr. Berman: May it please your Honor, I have asked permission to address the Court in connection with a matter that I understand is on this morning regarding a client of mine who is under inquiry in connection with the Judicial Inquiry pending before your Honor.

[fol. 33] The Court: Who is the client?

Mr. Berman: My client's name is Samuel Spevack, may it please your Honor, and in the Appellate Division a proceeding has been prosecuted to seek relief for him there as against an instrument, a subpoena duces tecum served upon him under the caption "Anonymous 14." That matter has been resolved against the petitioner therein and is on its way to the Court of Appeals from the determination in the Appellate Division.

At the time I learned of the instrument being returnable today, which was served upon the Chemical Corn Exchange Bank, I contacted Mr. Donlan and indicated that I would ask for an opportunity to address the Court so as to enable me, on behalf of my client, to request that the returnable phase of the instrument served on the Corn Exchange should be adjourned to give me an opportunity to take what I may deem to be adequate steps to protect my client's rights in advance of any compliance of said instrument.

That is my reason for being here today, your Honor, to make such application to give me a reasonable opportunity to do so.

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[fol. 35] The Court: How much time would you need?

Mr. Berman: I think possibly not more than a week to enable me, as to what I shall try to do.

The Court: All right. I will give you a week. In the meantime the other matter has been adjourned beyond the week period, but I will give you a week anyway to make whatever application you wish.

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[fol. 37] Brooklyn, N. Y., Monday
June 15, 1959

Mr. Caputo: The first matter on the calendar this morning, your Honor, is the matter of Samuel Spevack.

Just for the record I would like to give a summary of what has gone on. Mr. Spevack was served with a subpoena duces tecum dated June 2, 1958. Shortly thereafter he moved in the Appellate Division, Second Department, for an order vacating the subpoena duces tecum. That motion was denied by the Appellate Division by order dated July 21, 1958.

[fol. 38] Thereafter, he moved for reargument for leave to appeal to the Court of Appeals and for a stay. The Appellate Division, Second Department, denied all this relief by two orders dated October 20, 1958. Thereafter,

he moved in the Court of Appeals for leave to appeal to that Court. That motion was denied by the Court of Appeals by order dated January 15, 1959.

Thereafter, he petitioned for a writ of certiorari to the U. S. Supreme Court, October term, 1958 U. S. Supreme Court Docket No. 841, petition for writ was denied by the U. S. Supreme Court on June 1, 1959.

On June 2, 1959, I called Mr. Berman, David T. Berman, who represents Mr. Spevack, and told him that Mr. Spevack's appearance had been set before the Additional Special Term on June 11, 1959. On that day an adjournment was granted to today. Mr. Berman is here and Mr. Spevack is here.

Mr. Berman: My learned opponent has very accurately indicated what has happened by indicating the highlights of what has occurred to date.

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[fol. 42] Mr. Caputo: Just to state our position, your Honor, all we would like to do here is to have Mr. Spevack —after all, we are entitled to these documents. This has been going on in the Courts for some time and the subpoena has been sustained in its entirety and we would like for him to produce the documents. There is nothing that has to be done in court here.

The Court: Isn't it that simple? I am going to grant you an adjournment. I think I should do that. Is there anything I have to decide here? Hasn't this all been gone through? Aren't we entitled to the documents?

Mr. Berman: May I most respectfully indicate to your Honor that in my humble opinion the Court is not entitled to it and I believe I can argue that at the right opportunity. [fol. 43] It is unfortunate that the coincidence of other matters has come up.

The Court: I don't want to pre-judge it, but I want to tell you now that as of this moment my dispositions would be to direct that the documents be produced pursuant to the subpoena, because so far as I can see you have ex-

hausted every possible proceeding and motion with respect to the subpoena.

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[fol. 44] The Court: Counsel indicates to me that he is going to oppose this subpoena and not comply with its directions, is that right?

Mr. Berman: With basic subsisting objections, your Honor. But nevertheless it is our thought that if Mr. Spevack takes the stand, whether it be pursuant to your Honor's direction or whether it be as an officer of the Court, but nevertheless preserving his basic objection which I believe I have indicated by now that I most respectfully now reiterate for the record, all objections herein before made, if and when an occasion should arise constitutional privileges or rights or protection may be invoked at the time they arrive.

The Court: Of course.

Mr. Berman: Furthermore, I will also request—I haven't even gotten to that stage—that counsel, meaning myself, be permitted to remain during his questioning.

The Court: I will tell you now that I will permit that.

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[fol. 47] June 26, 1959.

Mr. Caputo: The next matter on the calendar, your Honor, is the matter of Samuel Spevack. As you know, the subpoena duces tecum which was served on him has been sustained right up to the United States Supreme Court. He appears today with his counsel, David T. Berman.

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[fol. 50] Mr. Berman: Thank you. At this time, may it [fol. 51] please your Honor, we reserve our basic objections as hereinbefore set forth in all of the motions hereinbefore made, and we most respectfully reserve our right to interject our constitutional rights and privileges as the need or occasion arises therefor.

May it please your Honor, I most respectfully advise the Court that while my client reserves his objections, as we have just indicated, I now most respectfully advise your Honor that the items set forth in the subpoena duces tecum herein, dated June 2, 1958, are so general that they may probably compel him to assert his constitutional rights against complying therewith on the grounds that they call for matter, the contents of which may tend to incriminate or degrade my said client or subject him to penalty or forfeiture in violation of the New York State Constitution and the Constitution of the United States, as amended.

Specifically I refer at this time to Article 1, Section 6 and 12 of the New York State Constitution, and the Fourteenth Amendment to the Constitution of the United States.

I most respectfully reserve any other constitutional [fol. 52] objections which are applicable if and when the occasion arises.

I wish to thank your Honor for giving me an opportunity to maintain and to assert my client's position.

Mr. Caputo: If your Honor please, in view of the statement that was just made by Mr. Berman, may I request the Court to have Mr. Spevack be sworn so that I may ask him some questions?

The Court: Surely.

Mr. Caputo: They will be very brief.

The Court: All right.

SAMUEL SPEVACK, 135 Eastern Parkway, Brooklyn, New York, called as a witness, being first duly sworn, testified as follows:

Mr. Caputo: May the record note that while I am asking these questions of Mr. Spevack, his attorney, is present.

By Mr. Caputo:

Q. Mr. Spevack, I know you are familiar with the subpoena duces tecum that was served on you some time ago,

which was dated June 2, 1958, and which has been sustained most recently by the United States Supreme Court [fol. 53] when it denied a writ of certiorari on June 1, 1959. Do you have the documents which you are commanded to produce pursuant to this subpoena?

Mr. Berman: May it please your Honor, I most respectfully believe I can possibly correct an inadvertent error made by my learned opponent. I believe the instruments in question were sent through the mail, but we have never raised that question. The instruments were sent through the mail to my client, but we have never questioned that there was the equivalent of service.

The Court: All right.

Mr. Berman: Merely for purposes of factual accuracy. I am sorry.

By Mr. Caputo:

Q. Then, Mr. Spevack, the question is, have you produced the documents which you have been commanded to produce pursuant to this subpoena?

Mr. Berman: May it please your Honor—

The Witness: May I—

Mr. Caputo: Why don't you state that?

The Witness: May I, Mr. Berman?

Mr. Berman: Excuse me. I beg your pardon. Excuse [fol. 54] me, Mr. Spevack.

May it please your Honor, I most respectfully advise your Honor that inasmuch as we have concluded that the constitutional privileges would be asserted before your Honor, and would be set forth, I ask my learned opponent whether it would be permissible, subject to your Honor's ruling and your Honor's determination, to avoid the physical carrying of possible instruments.

The Court: I understand.

Mr. Berman: But nevertheless, not to have such avoidance be deemed in any fashion contumacious or in any contempt or in any violation of any obligation per se.

The Court: I understand, but I think it is Mr. Caputo's point that it is the witness who must avail himself of his constitutional privilege.

Mr. Berman: Yes, I realize that.

The Court: Counsel for him can't do that in his behalf.

Mr. Berman: I understand that.

The Court: He must avail himself of it.

Isn't that your point?

[fol. 55] Mr. Caputo: Yes.

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[fol. 58] The Court: On what is before me, I must conclude that the validity of the subpoena was sustained in the Appellate Division, and appeal denied in the Court of Appeals.

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[fol. 59] By Mr. Caputo:

Q. Mr. Spevack, in the subpoena dated June 2, 1958, which has been litigated under the name of Anonymous No. 14, there are certain documents that you are commanded to produce pursuant to it. Do you have those documents with you today?

Mr. Berman: I believe the matter of physical possession is not necessarily a requisite.

Mr. Caputo: I would like an answer. I think the witness should answer the question.

A. I don't—I was under the impression that counsel had entered into an agreement with respect to the production of any records in the court, and I was guided by counsel.

Mr. Caputo: We agreed it was not necessary, your Honor, for him to physically produce the documents.

Mr. Berman: Thank you.

By Mr. Caputo:

Q. Then I ask you this question, Mr. Spevack: Why have you not produced these documents?

A. On the advice of counsel.

Q. What is that, Mr. Spevack?

[fol. 60] A. Counsel has advised me that the production of the documents—may I refresh my recollection, your Honor?

Mr. Caputo: Certainly.

The Court: Of course.

A. (Continuing) I am not accustomed to the procedure. That I have been advised that every step which has been taken by me or by my counsel has been done with the greatest respect for the Court, and I respectfully ask that I shall not be deprived of my constitutional rights by virtue of the proceeding herein, and that I was guided by my counsel's advice to assert in answer to this question that the production may tend to incriminate or degrade me or to subject me to some penalty or forfeiture, and I believe that I am entitled to the same protection that is guaranteed to all other persons. There may be tax problems, there may be other problems, and I therefore, having been advised by my counsel as the situation presently stands, the Court cannot grant me immunity, that I must refuse to surrender those documents on those grounds. If I am in error in respect to the matter of immunity, I would respectfully ask to be advised on the issue.

The Court: No, you are right. You are accurate and correct.

[fol. 61] By Mr. Caputo:

Q. Just for the purpose of clarification, among the many grounds that you have just stated, one of them is the privilege against self-incrimination, is that correct?

A. May I—

Q. There are various grounds that you gave for refusal to surrender the records.

A. Yes.

Q. And one of those grounds is the privilege against self-incrimination?

A. Yes.

Mr. Caputo: Thank you. That is all I have, your Honor.

The Court: I think I should say this, and I hope you will take it in the spirit in which I say it. The Inquiry is now in the process of preparing what has been referred to here as a test case, based upon the refusal of a witness to answer relevant questions, his refusal having been based upon constitutional grounds, the plea of his privilege.

It was the thought in some quarters that such an attitude, or such a plea, made in the context of this Inquiry, might be indicative of such a lack of candor with the [sic] as to [fol. 62] warrant disciplinary proceedings based upon that ground alone.

Of course, I am not prepared to say what will be the view of the Appellate Division on that question. My own thought is that there is a very serious question to be determined in connection with that situation. But I thought that I should call it to the attention of the witness and to your attention.

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[fol. 68] The Court: Do you feel that the record is clear as to the basis for the witness's refusal to produce the books?

Mr. Caputo: Yes.

The Witness: Sir, May I? I am sorry.

The Court: All right.

To produce them and surrender them in accordance with the command of the subpoena.

Mr. Berman: May I hear that again?

The Court: The subpoena called for the production and surrender of the books, or production of the books, correct?

Mr. Berman: Yes.

The Court: They have not been produced, and I simply asked counsel whether the record was clear upon the reason or the basis for the witness's refusal to produce them. I think it is. There must not be any mistake about his position, that is all.

Mr. Berman: To turn over—

The Witness: Turn over, your Honor—

Mr. Berman: May I ask it be clarified, to turn over as distinguished from production, so there will be no mis-

[fol. 69] understanding. Assuming, whatever the instruments are, the records are, were in Mr. Spevack's possession, we would then assert the privilege—

The Court: Wait. Am I right in this, that the basis of the witness's refusal to produce the books, leaving aside the understanding that you didn't actually have to physically bring them here today, leaving that out, the basis of his refusal to produce the books is that they might tend to incriminate him?

Mr. Berman: Yes.

The Court: Is that the basis?

(The witness shook his head in the negative.)

The Court: You better state it again. The subpoena calls for the production of the books. They have not been produced.

The Witness: Whatever records, your Honor, that were available to me, I could physically, if I had obtained the time, get them together in a package and in a bundle and bring them here alongside of me.

The Court: Right.

The Witness: I was told by counsel that Mr. Caputo had agreed that that act physically was not essential and necessary.

[fol. 70] The Court: Right.

The Witness: Therefore, if I may say, the matter of production of the books, or of bringing them here physically is not in issue.

The Court: All right, leave that out now.

Mr. Berman: Thank you.

The Witness: That the only matter in issue is the refusal to turn them over.

The Court: I think we better get this more clearly stated, counsel. Maybe we better go back and get the books. I mean I don't want that little thing to interfere with what we mean here, or to confuse the situation. If it is going to be confused, the only thing I can suggest is that counsel go to his office and bring the books here, and we will start all over again.

I want to know whether, assuming they were here, and assuming reference was made to them by counsel, and questions asked with respect to them, whether the witness's answer would be a refusal upon the basis that his answer might tend to incriminate him.

The Witness: That is basically so.

Mr. Berman: Yes.

[fol. 71] The Witness: That is the understanding.

Mr. Berman: Yes, sir, definitely so.

The Court: Then the record I think is clear.

Mr. Berman: Thank you.

Mr. Caputo: Yes. I thought it was.

The Court: I don't want to belabor the point, but I do feel that in this kind of a situation, and you very well know, the record must be absolutely clear as to whether or not the witness pleaded his constitutional privilege. If there is any equivocation about it, the record is no good. So that is the reason.

The Witness: I do not intend any equivocation, your Honor.

The Court: I didn't mean to suggest that you did. And I want to say, too, for the record that you have a perfect right to plead that constitutional privilege. That is my opinion.

Mr. Berman: Thank you very much, your Honor.

Mr. Caputo: Your Honor, just to wind up here, you stated earlier and you have just stated that you sustained

without equivocation Mr. Spevack's plea of privilege of self-incrimination for not producing the documents. But [fol. 72] at the same time I believe you stated earlier that, notwithstanding that plea, he has a duty to be candid and frank with this Court, and that perhaps his refusal to produce these documents may have some serious consequences by way, perhaps, of disciplinary action. I believe that that is what the Court said earlier.

The Court: I said that there was in process a test case in which that question will be argued and contested and determined.

Mr. Berman: There is a test case in the process?

Mr. Caputo: Yes.

Mr. Berman: I see.

The Witness: May I, your Honor, without the advice of counsel, having practiced before the Bar so many years, ask whether or not my matter may not stand suspended until the determination of what may be a test case? I have a great deal at stake here, your Honor.

The Court: Of course.

The Witness: I testified before the Bar Association in 1945, I have been practicing before the Bar, having been [fol. 73] admitted in 1926, and I question in my own mind whether or not I should be placed in the peril of having a determination made when, with all the diligent search that my counsel and I have made, and others have made, there has been no determination on that issue.

The Court: No, I think counsel's question is this: Whether or not this Inquiry intends to proceed in accordance with the theory of the so-called test case in his situation, and I think it is fair to say that we do not so intend. This test case is exactly what the words mean.

Mr. Berman: I understand.

The Court: And until the disposition of that, the final disposition of that, of course no other such proceedings will be brought. Isn't that fair?

Mr. Caputo: I think that is a fair statement, your Honor.

The Court: I think so.

The Witness: So that I may be clear in my befuddled mind, your Honor, would that mean that my matter here is not foreclosed by today's position?

The Court: Well, let's see if we can define it more clearly.

[fol. 74] The Witness: Well, it is just as if in a trial all sides rest.

The Court: Let's assume that the Appellate Division, when, as, and if it is confronted with the question, determines that the refusal to answer relevant and material questions at this Inquiry, relating to a man's practice, is indicative of such a lack of candor with the Court as to warrant disbarment. Let us assume that they so determine. If that should be the decision of the Appellate Division, of course you and everybody else would be given a full opportunity to come back here with your records and to testify. Isn't that right?

Mr. Caputo: Certainly, your Honor. I am quite certain that would be the procedure that would be followed.

The Court: Surely.

Mr. Caputo: We are not here to establish records for the purposes of disbarment, your Honor. We are here to find facts only.

The Court: You will be given every opportunity if that should be the determination.

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[fol. 75] Brooklyn, New York, Tuesday, September 5, 1961

Before:

Hon. Edward G. Baker, Justice.

[fol. 76] Appearances:

Denis M. Hurley, Esq., David T. Berman, Esq., representing Samuel Spevack.

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[fol. 77] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Do you have any particular date in mind?

Mr. Hurley: How busy is Mr. Spevack? We would like to suit your convenience.

Mr. Berman: Would it be possible to go beyond Yom Kippur, the end of the holiday week, or would that be too much of a request? That would be past September 20th and then perhaps to go to September 26th, if that is permissible. That would be for the purpose of avoiding the holidays.

Mr. Hurley: That would be agreeable to us, your Honor.

The Court: We will adjourn it to October 2nd at ten o'clock.

Mr. Hurley: I would like to raise a question, your Honor. I put in the letter to Mr. Berman, as I did with other attorneys, that today Mr. Spevack is expected to produce and deliver to the Inquiry for examination all his financial records as previously subpoenaed and that Mr. Spevack should be present in order to testify to the keeping and identity of such financial records.

Do I understand from one of my assistants that you and [fol. 78] your client intend to raise a question about delivering or turning over to the Inquiry for inspection the financial records?

Mr. Berman: Not per se any objection. It is just that some of the items in question do not exist and never existed. I thought at the right time we could explain what is available. When the conference is set we could then go over each item pursuant to the subpoena which was served and then indicate whatever is in existence and available.

The Court: I think you told me that the last time you were in. Some of the records called for in the subpoena were not in existence.

Mr. Berman: That is right, sir.

The Court: All we want are the records which he keeps.

Mr. Berman: There are about eleven or twelve items. At the proper time we thought we could discuss the matter

and then by referring to each particular item indicate whatever we have available. Perhaps there may even be an opportunity to eliminate some of the items if they are not relevant.

Mr. Hurley: Those that are available and that Mr. [fol. 79] Spevack has will be left for inspection with the Inquiry.

Mr. Berman: Do you want them all brought over? You cover a number of years.

Mr. Hurley: Mr. Berman, my thinking on this is that rather than our discussing them or you and I discussing the particular items with the Judge, wouldn't it simplify the matters, as we do in all cases, to have Mr. Spevack come in, take the stand and produce them, and we will then mark them for identification. Then he can explain the absence of any other records. We can go through the subpoena piecemeal with him.

Mr. Berman: At that time we can discuss each particular item you set forth in the subpoena.

Mr. Hurley: That is right.

Mr. Berman: If an occasion should arise that we suggest that some of the matters would not be relevant to his practice of law, would he then be able to mention it? Because this is pertaining to his business as an attorney. It refers to the following records: "Pertaining to your business as an attorney." That is one thing I would like to have [fol. 80] clarified.

Mr. Hurley: I would like to suggest to your Honor that that comes up at a later date, it seems to me. In other words, at this time we want such records that we called for and are available. Then we will have Mr. Spevack identify them, mark them for identification, and then they are turned over to us for examination. When we attempt before Judge Baker later to offer these records in evidence at the Judicial Inquiry, or at the Additional Special Term, then it seems to me is the time that the Judge will have to rule on the relevancy of the records or whether there is any privilege involved, and so forth.

Mr. Berman: First you rather we produce anything and everything we can that would comply and then later we may object to any specific item?

The Court: Of course.

Mr. Hurley: It has happened, as the Judge will bear out, on some occasions. We have asked for some records and gone through them and we may find nothing wrong and therefore we never offer them in evidence. If we do find anything that is improper or anything that proves a [fol. 81] point, then and only then we offer them in evidence.

Mr. Berman: We all know that the presumption of innocence pertains to anybody.

Mr. Hurley: Of course.

The Court: All right, October 2nd.

Brooklyn, New York, Monday, October 2, 1961.

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Mr. Caputo: Your Honor, the first matter on the calendar today is in the matter of Samuel Spevack, an attorney who was served with a subpoena duces tecum and who is going to make an application today through his counsel, David T. Berman.

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[fol. 83] Mr. Caputo: Would it be advisable at this time, your Honor, for Mr. Berman to state for the record what position, if any, Mr. Spevack will take on October 9th in connection with the production and surrender of possession of his records?

Mr. Berman: I would rather not, with your permission, because we have already discussed that when we came before your Honor. That was mentioned to some extent when Mr. Hurley was present and at that time something was indicated.

The Court: In any event, the books will be produced on that day.

Mr. Berman: Those which are in existence. That was mentioned before. Some of the items were never in existence, to begin with.

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[fol. 84] Mr. Caputo: If your Honor please, I just want to know if on Monday, the 9th, Mr. Spevack will not only produce his records but will surrender custody of the records to the Judicial Inquiry and Judge Baker.

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[fol. 85] The Court: I wonder if we are not unnecessarily complicating the matter. What we would like to know, if possible in advance, is whether or not any question will be raised about the right of the Inquiry to have custody of the records for the purpose of examining them.

Let me say this: We look at it from a practical viewpoint. We cannot possibly go over the records at the moment they are produced.

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[fol. 87] The Court: For the present we are concerned with the production of the records on the adjourned date. They will be produced?

Mr. Berman: At that point that which can be produced will be produced.

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[fol. 90] Brooklyn, N. Y. Monday
October 9, 1961.

Mr. Caputo: This is in the matter of Samuel Spevack, your Honor. Mr. Berman, who represents Mr. Spevack, I believe has a statement to make for the record.

STATEMENT BY MR. BERMAN, COUNSEL FOR MR. SPEVACK

Mr. David T. Berman: In the nature of an application, may it please the Court. May it please your Honor, my

application has two subdivisions. The first is on behalf of Mr. Spevack. We most respectfully request an adjournment of the matter before the Court for three weeks.

Second, to relieve me from all further responsibility or [fol. 91] reference in connection with this matter.

Mr. Spevack has indicated he desires to have another attorney represent him. I am informed that one Bernard Shatzkin, of 235 East 43nd Street, Mnahattan, a member of the firm of Shatzkin & Cooper of that address will represent Mr. Spevack, or possibly the firm will represent him.

Mr. Shatzkin will personally handle the matter.

As of late Friday evening, after speaking to Mr. Spevack, it appeared that the proper steps to take as an officer of your court, on my own behalf, would be to indicate to the Court that I am to be replaced by Mr. Shatzkin, as distinguished from any other possible interpretation. I therefore so advise the Court.

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[fol. 92] COLLOQUY

The Court: Two weeks from today. Of course, your application to be relieved is granted.

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[fol. 94] Brooklyn, N. Y., Monday, October 23, 1961.

Appearances:

Bernard Shatzkin, Esq., Representing Samuel Spevack.

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[fol. 97] The Court: How about the production of the records, counsel?

Mr. Shatzkin: If your Honor pleases, we intend to produce the records called for by the subpoena. We had made

all those arrangements on Friday. We intended producing them here this morning.

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[fol. 98] Brooklyn, New York
Monday, December 4, 1961

Mr. Caputo: We have on this morning's calendar, your Honor, the matter of Samuel Spevack. Mr. Bernard Shatzkin is here for Mr. Spevack.

The purpose of the appearance today, your Honor, is to request of Mr. Spevack that he produce and surrender [fol. 99] custody of the financial books, records and documents called for in the subpoena served on him on June 2, 1958, issued by the Judicial Inquiry on June 2, 1958.

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[fol. 105] The Court: It is a difficult thing to do, but I certainly don't want anybody to say that this Court has been unfair in any respect to anybody who has been asked to come here.

I will grant an adjournment, but it has got to be the last. The question is, to what date? When will you finally make up your mind whether or not the books are going to be produced?

Mr. Shatzkin: With respect to the date, by virtue of the circumstances that I have outlined, I respectfully request about the second week in January.

The Court: January 10th?

Mr. Shatzkin: That is satisfactory.

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[fol. 106] Brooklyn, N. Y. January 10, 1962.

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Mr. Caputo: Your Honor, the next matter on is the matter of Samuel Spevack, who is scheduled to produce some financial records. He is here represented by his attorney, Bernard Shatzkin.

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[fol. 110] The Court: * * * In other words, we have a subpoena now outstanding which has called for the production of certain books and records, and there are no charges pending against your client, of course.

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[fol. 113] The Court: I don't know what I can do except to direct that those records be produced, counselor. I don't think I have any alternative.

* * * * * * *

Mr. Shatzkin: I appreciate your Honor's position in the matter, and I am grateful for the indulgence shown to me [fol. 114] and my client in the past. I am also appreciative of Mr. Hurley's position and Mr. Caputo's position, but I think I should apprise the Court of the fact at this time that in the event my application to wait until the Appellate Division makes its determination is denied, that my client has been advised by me that in my opinion he should assert his constitutional privileges in case we have to proceed today and refuse to—assert all of his constitutional privileges under the Constitution of the United States and under the Constitution of the State of New York.

The Court: I feel, counselor—I don't want to be unfair about this, but I feel I must take the position I have stated.

* * * * * * *

[fol. 115] Mr. Caputo: I would suggest to the Court, if you will, that Mr. Spevack assume the stand and state under oath what his position is at this time.

The Court: Do you want to discuss it further with Mr. Spevack before we proceed? I will be glad to give you that opportunity.

Mr. Shatzkin: Yes, your Honor.

(A brief recess was taken.)

Mr. Caputo: I believe I left off by requesting that the Court ask Mr. Spevack to take the stand and state under oath what his position is.

SAMUEL SPEVACK, recalled.

Examination by Mr. Caputo:

Q. Mr. Spevack, you were served with a subpoena in June of 1958 requesting you to produce certain financial records, is that correct?

A. Yes.

Q. In June of the year 1959, when you were sworn and took the stand, you were asked if you would produce the records called for by that subpoena, is that correct?

Mr. Shatzkin: That is objected to. The record speaks [fol. 116] for itself.

The Court: I will allow the question.

A. I don't recall precisely what I said, but what is in the record is right.

Q. At that time you refused to produce the records upon the ground that the contents thereof might tend to incriminate you and you invoked that constitutional privilege as the ground for refusing to produce your records.

Mr. Shatzkin: I don't know that this witness should be called upon to answer a question based upon Mr. Caputo's recollection of what he said at that time unless Mr. Caputo will read specifically or offer the witness the record to indicate exactly what he said.

Mr. Caputo: I want him to understand, your Honor, what his position was at that time so that in answering the questions that I will ask him a little later on he has sufficient background now to answer the present questions intelligently.

The Court: Why not just answer the questions which you want to propound now without reference to what has happened in the past? As counsel says, the record that we have, of course, will speak for itself.

[fol. 117] Q. Mr. Spevack, do you at this time wish to withdraw the privilege of self-incrimination which you invoked at a previous time before Mr. Justice Baker in con-

nection with the subpoena served on you, dated June 2, 1958?

A. I have conferred with my counsel, Mr. Shatzkin, at length, and he has advised me, after examining the law and relying upon his advice to me as a lawyer, and me as a client, I don't know that I can answer the question precisely as you asked it, but I restate, as best as I can, what my position is and I might say that I respectfully would be obliged not to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty, and further in that respect I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6 of the Constitution of the State of New York, and also the constitutional privilege accorded by both the Fifth Amendment and the 14th Amendment of the Constitution of the United States.

There is some other document that my counsel might offer me here so that my answer may be full and complete.

I also take the position, on the advice of counsel, under the 14th Amendment of the Constitution of the United [fol. 118] States, with respect to right of fundamental fairness, and claim that the subpoena duces tecum is far too broad under that interpretation in relation to fairness.

I also respectfully invoke my right to due process of law and the equal protection of the laws under the 14th Amendment of the Constitution of the United States.

Q. Mr. Spevack, I ask you at this time if you will, pursuant to the subpoena of June 2, 1958, produce the day book requested therein, just to speed the process, if your answer is the same, with permission of the Court, would you say the same?

A. Yes.

Q. Is your answer the same?

A. It is.

Q. Would you produce, pursuant to that subpoena, cash receipts book?

A. The answer is the same.

Q. Cash disbursements book?

A. The answer is the same.

Q. Check book stubs?

A. The answer is the same.

Q. Petty cash book?

A. The answer is the same.

[fol. 119] Q. Petty cash vouchers?

A. The answer is the same.

Q. General ledger and general journal?

A. The answer is the same.

Q. Canceled checks, bank statements, duplicate deposition slips of regular and checking accounts, open and closed?

A. The answer is the same.

Q. Passbooks and evidence of accounts other than checking accounts, with all depositories, such as savings banks, savings and loan associations, postal savings, credit unions, etc.?

A. The answer is the same.

Q. Record of all loans made from financial institutions and others, open and closed?

A. The answer is the same.

Q. Payroll records consisting of: (A) Payroll book, (B) Social Security and withholding tax returns?

A. The answer is the same.

Q. Copies of Federal and State income tax returns and accountant's work sheets relative thereto?

A. The answer is the same.

Q. Mr. Spevack, I will read to you from the opinion of [fol. 120] the matter of Cohen, decided by the Appellate Division, Second Department. The following language appears at 9 Appellate Division 2d, pages 448, 449: "To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this Court is not the fact that respondent has invoked his constitutional privilege against self-incrimination, but rather the fact that he has deliberately refused to cooperate with the Court in

its efforts to expose unethical practices and in its efforts to determine incidentally whether he has committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar."

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[fol. 123] Mr. Cohen was disbarred as a result of those decisions.

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[fol. 124] COLLOQUY

The Court: It is true that Mr. Spevack, I think, on at least two occasions indicated his desire and willingness to [fol. 125] appear before the Inquiry, and to testify.

Mr. Caputo: Yes, sir. If your Honor please—

The Court: What is the purpose of submitting the letters or marking them in evidence? There is no dispute on the point.

Mr. Caputo: If your Honor please, the purpose is this: The quotations from the Albert Martin Cohen decisions in the Appellate Division, the Court of Appeals and in the U. S. Supreme Court are for this purpose: We will urge, the Judicial Inquiry will urge to the Appellate Division that your failure at this point to produce the records called for by the June 1958 subpoena, subpoena duces tecum, is the kind of lack of cooperation within the meaning of the Albert Martin Cohen decision, and that therefore the same —possibly the same serious consequences may flow from your present position as they did in the case of Albert Martin Cohen.

The Court: I still don't see the relevancy of the fact that he indicated a willingness at some past time, some prior occasion, to produce the records upon the question we are confronted with now.

Mr. Caputo: I believe, your Honor, that that shows [fol. 126] lack of cooperation.

The Court: He has availed himself today of his privilege against self-incrimination.

Mr. Caputo: But those letters would indicate that he is making some position known to the Court, which is inconsistent with his present position, and I contend—

The Court: Which is inconsistent with a position which he took in the past, is that right?

Mr. Caputo: These letters also indicate that he was going to withdraw his privilege of self-incrimination.

The Court: Yes.

Mr. Caputo: And I say that is lack of cooperation.

Mr. Shatzkin: I respectfully suggest with regard to that, that these letters speak for themselves, and that Mr. Caputo does not properly place his own interpretation upon them at this time. The letters speak for themselves.

The Court: Frankly, I am not sure of the relevancy of them, but I can't see that Mr. Spevack will be prejudiced in any way by their being received in evidence. There is [fol. 127] no question that they are his letters. Whether they have a bearing on this particular thing, I am not prepared to say. I will allow them.

I think you wanted to ask Mr. Spevack if that was his letter?

Mr. Caputo: Yes. If we can get some concession here, it may not be necessary to ask him.

Mr. Shatzkin: May I see it again, please?

Mr. Caputo: Surely. The only concession I would like is that the letter of June 29, 1961, was sent by Mr. Spevack to Judge Baker, and that Judge Baker received it, and that the annexed note-typed letter was also annexed to the letter and was sent by Mr. Berman, who was Mr. Spevack's attorney at the time, and that both were received by Judge Baker.

Mr. Shatzkin: I desire to cooperate in simplifying these proceedings, but I don't want Mr. Spevack placed in the position that it may ever be urged that he opened the door by answering any questions. By virtue of those circum-

stances, unless I receive some assurance by Mr. Caputo to that effect, I think I must advise Mr. Spevack to give a [fol. 128] similar answer to this question that he gave to those other series of questions.

* * * * * * *

[fol. 132] Mr. Caputo: Mr. Spevack, I mentioned earlier what the position of the Judicial Inquiry will be in connection with your present position of refusing to produce the records called for by the June 2, 1958 subpoena. You have invoked your privilege against self-incrimination. In view of the statements that I have made, the quotations from the opinions in the Albert Martin Cohen case, the references that I have made to the Canons of Ethics, and to the [fol. 133] New York State Penal Law, do you still maintain the position that you took earlier?

A. I must respectfully do so on the advice of my counsel.

Mr. Caputo: I don't believe I have anything further, your Honor.

Mr. Shatzkin: May I make a short statement?

The Court: Surely.

Mr. Shatzkin: So that there will be no misunderstanding as to precisely what Mr. Spevack's claim is with respect to privilege, I quote from the U. S. Supreme Court decision in Cohen, referred to by Mr. Caputo, wherein the Court stated that Mr. Cohen relied solely upon "the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under Article 1, Section 6 of the New York State Constitution."

I direct attention to the fact that Mr. Spevack does not rely solely upon that, that Mr. Spevack, in addition to relying upon that relies specifically on the matters which he set forth in his claim of privilege and specifically relies on the 14th Amendment, and that he does claim a Federal privilege not to testify, very specifically under the 14th [fol. 134] Amendment and not merely, in the words of the U. S. Supreme Court, majority opinion where they stated in Cohen, "We take the petitioner's position and the

remittitur of the Court of Appeals as presenting under the 14th Amendment only a broad claim of fundamental unfairness."

We not only claim that, but we claim specifically a privilege not to testify under the 14th Amendment of the Federal Constitution.

Mr. Spevack also claims for himself all of those privileges which Chief Justice Warren, Mr. Justice Brennan, Mr. Justice Douglas, and Mr. Justice Black said that an attorney would have the right to claim.

That is all I have to say with respect to that.

Mr. Caputo: Just in closing, I wonder if I may make a statement that the position of the Judicial Inquiry in connection with what its future action will be as a result of Mr. Spevack's present position—do you understand that, Mr. Shatzkin?

Mr. Shatzkin: No.

Mr. Caputo: Then I will repeat it. I think it is worthwhile repeating. The Judicial Inquiry will urge to the Appellate Division that Mr. Spevack's refusal based upon [fol. 135] the privilege of self-incrimination to produce the records called for by the June 1958 subpoena is a lack of cooperation within the meaning of the Albert Martin Cohen case, and that we would urge to the Appellate Division that such lack of cooperation requires disciplinary action just as it required disciplinary action in the Albert Martin Cohen case, and, as you know, Mr. Cohen was disbarred.

That is the position that the Judicial Inquiry will urge to the Appellate Division.

I would just like to know if you understand our position?

Mr. Shatzkin: Yes, I do.

Q. Mr. Spevack, do you understand our position?

A. Yes.

Mr. Caputo: That is all.

(Witness excused.)

* * * * * * *

[fol. 139] Brooklyn, New York,
July 9, 1962—Monday.

(Bernard Shatzkin, Esq., appeared as counsel for Samuel Spevack.)

* * * * * * *

SAMUEL SPEVACK, having been recalled, resumed the [fol. 140] witness stand, and continued his testimony as follows:

Mr. Shatzkin: Being that we do not have copies of the minutes of the previous hearing, Mr. Caputo has shown to me what he points out to be the relevant pages of the assertion by Mr. Spevack of his constitutional privileges at the last hearing held sometime in January—

Mr. Caputo: That is correct.

Mr. Shatzkin: —of 1962. The only purpose of my statement at this time is to make sure that Mr. Spevack has either asserted, on his own behalf, all of the protective assertions necessary to protect him completely with respect to his constitutional privileges, in the event that they have not all been stated, or for the sake of adequately covering that situation I would like to state very briefly, in summary, that there is asserted here on Mr. Spevack's behalf—

Mr. Caputo: May I interrupt for a minute, Mr. Shatzkin? The last time that Mr. Spevack asserted his constitutional privileges it was in response to questions that I had put to him concerning the production of sub- [fol. 141] poenaed documents under the subpoena served upon him by the Judicial Inquiry in June of 1958. Would your Honor think it best for me to simply again ask Mr. Spevack if he will produce those records, have him say that he does not produce them for the reasons previously asserted, and for the additional reasons which he is not putting on the record? Do you think perhaps that would be a better procedure, your Honor?

The Court: Well, I haven't reviewed the record, but isn't the present record clear enough on the point? I think

it is perfectly proper we do it in the way you suggest. Do you have any objections?

Mr. Shatzkin: Yes, I just would like to avoid the repetition. I think it was done adequately at one time but I simply want to make certain that it is clear in here, and one of the reasons for my apprehension is the fact that the United States Supreme Court in the Cohen case, the majority at least, said that while Cohen had asserted one position before the Inquiry, he had not stayed with that position with respect to claiming constitutional privilege. For instance, I am addressing myself specifically to the [fol. 142] 14th Amendment, where the majority said, and I am quoting now from footnote number 1, of Mr. Justice Harlan's opinion, and I am quoting:

"* * * He relied solely upon the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under Article 1, Section 6 of the N. Y. State Constitution."

Then they go on to say:

"* * * Court of Appeals as presenting under the 14th Amendment only a broad claim of fundamental unfairness."

Our position is that we don't want to be left in that position, and we are now asserting the 14th Amendment, with specificity, to use the language of the minority, not only with respect to the broad general intention of the 14th Amendment but the majority claims Cohen only availed himself of, and we also want to add an assertion of our constitutional rights under the 4th Amendment of the Constitution. Is that correct, Mr. Spevack?

Mr. Spevack: That is so.

Mr. Shatzkin: Rather than you repeating all of that, you want this record to be considered as though you said [fol. 143] what I just said?

Mr. Spevack: That is the fact.

The Court: I think that covers it.

Mr. Caputo: Well, let's see—

The Court: May I see the minutes—unless you need them.

Mr. Caputo: Beginning here, your Honor, is Mr. Spevack's statement of constitutional privileges.

(Mr. Caputo handed to the Court.)

The Court: I think it is broad enough. It seems to me it is perfectly clear what Mr. Spevack's position is.

Mr. Caputo: So that I may have it clear in my own mind, the situation as it exists now is this: when I asked Mr. Spevack in January of this year to produce the records pursuant to the subpoena of June 1958, which was served upon Mr. Spevack, he refused to produce the records and gave as the ground for his refusal the statement of various constitutional privileges which appear in the record. As I understand it now, he continues to refuse to produce those records asserting, of course, the same constitutional privileges he asserted then, but in addition thereto he [fol. 144] further asserts the constitutional privilege against unreasonable searches and seizures, as it is found in the 4th Amendment to the United States Constitution, is that correct, Mr. Spevack?

Mr. Spevack: That is correct. Incidentally, I also assert the privilege guaranted under Article 1, Section 12 of the N. Y. State Constitution, which in effect is a general release statement of the 4th Amendment of the United States Constitution—

Mr. Caputo: Article 1, Section 12?

Mr. Spevack: Yes.

Mr. Caputo: Of the N. Y. State Constitution?

Mr. Spevack: Yes.

Mr. Caputo: And that is the unreasonable searches and seizures provisions of the N. Y. State Constitution, is that correct?

Mr. Spevack: That is so.

Mr. Caputo: And you are invoking that as well?
Mr. Spevack: Yes.
Mr. Caputo: I think the record is clear, your Honor.
The Court: It seems clear to me.

(End of Petitioner's Exhibit 2.)

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[fol. 148] Mr. Klein: The letter annexed on the letterhead of Samuel Spevack, attorney at law, is dated July 6, 1961, also addressed to Hon. Edward G. Baker, and reads as follows:

"Sir:

"In view of the recent decision by the Supreme Court of the United States in the Cohen matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before Your Honor, during the course of the Judicial Inquiry, which I then asserted in good faith, upon the advice of counsel, and in the sincere belief that I then had the right to so do.

"I am willing to testify and answer questions concerning relevant matters.

"Respectfully yours, (signed) Samuel Spevack."

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[fol. 150] Mr. Klein: Referring to what is now Petitioner's Exhibit 5, it is a letter on the letterhead of the Supreme Court of the State of New York, Justices' Chambers, Brooklyn, N. Y., Edward G. Baker, Justice, dated July 26, 1961, addressed to Samuel Spevack, Esq., 66 Court Street, Brooklyn 1, New York.

"Dear Mr. Spevack:

"This will acknowledge your letter of July 6, 1961, in which you withdraw the plea of privilege asserted at the time of your appearance at the Judicial Inquiry.

"Since the members of the Inquiry staff are now engaged in other matters requiring their full attention, I am unable at this time to fix a specific date for your return. I shall do [fol. 151] so at the earliest possible opportunity, and notify Mr. Berman, so that a date convenient to all may be arranged.

"Very truly yours, (signed) E. G. Baker."

* * * * * * *

[fol. 164] (After recess.)

(The proceedings were continued.)

Mr. Klein: If it please the Court, I would like to re-open the case of the petitioner for the purpose of calling the respondent to the witness stand.

I call upon Mr. Spevack to take the witness stand.

Samuel Spevack, respondent, residing at 135 Eastern Parkway, Brooklyn, New York, called as a witness by the petitioner, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Klein:

Q. Mr. Spevack, you are the respondent in this proceeding?

A. Yes.

Q. When were you admitted to the bar, Mr. Spevack?

A. In March of 1926.

Q. And after your admission did you then engage in the practice of law?

A. I respectfully refuse to answer any questions other than that which I have already answered, first reiterating [fol. 165] the constitutional privileges guaranteed by the United States Constitution and by the Constitution of the State of New York which I have heretofore asserted on several occasions, and I now more specifically respectfully

refuse to answer the question on the ground that my answer might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty. I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6, of the Constitution of the State of New York and the Fifth Amendment and the 14th Amendment of the Constitution of the United States. I respectfully invoke my right to due process of law and the equal protection of the laws under the 14th Amendment of the Constitution of the United States.

Q. Do I understand it, Mr. Spevack, that any question I intend to put to you you would give the same answer that you have just given?

A. That is so.

The Referee: Mr. Spevack, are you aware of the serious consequences that might flow from a refusal to cooperate with the Court in its efforts to expose unethical practices in its efforts to determine if you have committed any acts of [fol. 166] professional misconduct?

The Witness: I am aware of the position I am taking, sir, and—but I respectfully submit that the question asked of me might be subject to different interpretations.

Q. May I ask you, Mr. Spevack, Are you aware that the position you have taken may result in disbarment?

A. I am fully aware of the obligations and of the possible penalties that may be imposed.

Q. All right.

Cross examination.

By Mr. Shatzkin:

Q. Are you also aware, Mr. Spevack, that the position you have taken may result in the dismissal of these charges?

A. I certainly am.

The Referee: All right. Is that the petitioner's case?

Mr. Klein: That's the petitioner's case.

The Referee: Thank you.

The Witness: Thank you, sir.

The Referee: Mr. Shatzkin.

Mr. Shatzkin: The respondent respectfully moves to dismiss the specifications—respectfully moves to dismiss the [fol. 167] entire petition and the specifications concerning which proof has been offered by the petitioner on the grounds that the allegations contained therein and the proof offered do not constitute the legal basis for disciplinary action.

We respectfully urge that respondent's refusal to answer the questions and to produce the books and records alleged in the petition in reliance on his privilege against self-incrimination was made in the past in good faith and is being made today in good faith and was and is properly based upon the provisions of the Constitution of the United States and the Constitution of the State of New York and the amendments thereof and cannot lawfully constitute a basis for disciplinary action. Such action would violate respondent's right to invoke the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6, of the Constitution of the State of New York and the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States and would also violate respondent's right to due process of law and the equal protection of the laws under the Fourteenth Amendment of [fol. 168] the Constitution of the United States.

Although the case of Cohen v. Hurley, 366 U.S. 117 held that an attorney at law is not entitled to the protection of the Fifth Amendment of the Constitution of the United States, when he is called upon to testify in a judicial inquiry concerning his activities as a lawyer, nevertheless, that case was decided upon the authority of Twining v. New Jersey, 211 U.S. 77, wherein it was held that the Fifth Amendment of the United States Constitution does not apply to the states.

The attention of this tribunal is respectfully invited to the fact that during its current term the Supreme Court of

the United States indicated that they are prepared to reconsider Twining's rule that the Fifth Amendment privilege against self-incrimination does not apply to the states, and for that purpose the Supreme Court granted the petition for certiorari in Mally v. Hogan, 150 Conn. 520, 187 A. 2d 745; certiorari was granted and argued in the United States Supreme Court on March 5, 1964, bearing calendar number 110.

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[fol. 180]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

In the Matter of SAMUEL SPEVACK, Attorney,

SOLOMON A. KLEIN, Esq., Petitioner,

SAMUEL SPEVACK, Attorney-Respondent.

REPORT OF REFEREE—October 21, 1964

To the Appellate Division:

By this Court's order of September 23, 1963 the issues raised by the July 8, 1963 petition of Solomon A. Klein (hereinafter called "petitioner"), in respect to Samuel Spevack (hereinafter called "respondent"), and the September 5, 1963 answer of respondent were referred to me for hearing and for a report setting forth my findings.

The hearing was held on June 2, 1964. Extensive briefs were thereafter filed. The final answering brief was filed on October 7, 1964.

The Petition

The petition alleges, and the answer admits, that respondent was admitted to practice before this Court in March, 1926, and that, at the times mentioned in the petition, he practiced law in Kings County (pet., paras. 3, 4; ans., para. 2).

The petition further alleges, and the answer likewise admits, that, during the course of the Judicial Inquiry initiated by this Court's order of January 21, 1957, respondent, in response to a subpoena duces tecum dated June 2, 1958, appeared before the Additional Special Term (Arkwright, J.) on June 12, 1958, and that, at respondent's request, he was granted several adjournments to June 26, 1959 when he again appeared before the Additional Special Term (Baker, J.) (pet., paras. 2, 5; ans., para. 2).

The petition goes on to allege that, on June 26, 1959, [fol. 181] respondent refused to produce any records enumerated in the aforesaid subpoena upon the ground that their production might tend to incriminate or degrade him or subject him to some penalty or forfeiture (pet., para. 6); that thereafter, on or about June 26, 1961, respondent requested that he be permitted to appear before the Additional Special Term to testify and to produce the records (pet., para. 7); that, pursuant to this request, respondent appeared on January 10, 1962 before the Additional Special Term (pet., para. 8); that respondent again refused to answer any questions and to produce the records, claiming his Constitutional privilege against self-incrimination (pet., para. 8); that respondent was apprised that failure to answer might give rise to disciplinary action (pet., para. 8); that, on July 9, 1962, respondent appeared as a witness before the Additional Special Term and likewise refused to produce his records upon the ground of self-incrimination and upon the additional ground that to require production would violate the Fourth Amendment and Article I, Section 12 of the New York Constitution (pet., para. 9).

The answer does not dispute that the aforesaid events occurred generally as alleged by the petition but begs leave to refer to the official minutes for respondent's exact refusals and offers (ans., paras. 3, 4, 5, 6).*

[fol. 182] The petition alleges, and the answer denies (ans., para. 7) that respondent has been guilty of professional misconduct and conduct prejudicial to the administration of justice as follows:

para. 10 (A): The refusal of the respondent SAMUEL SPEVACK to produce the records set forth in the subpoena duces tecum alleged in paragraph "5." above and his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry

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* The answer sets up the following affirmative defense:

"Respondent's refusal to answer the questions and to produce the books and records alleged in the Petition herein in reliance on his privilege against self-incrimination, was made in good faith and was properly based upon the provisions of the Constitution of the United States and the Constitution of the State of New York, and the amendments thereof, and cannot lawfully constitute a basis for disciplinary action. Such action would violate Respondent's rights to invoke the constitutional privilege against self-incrimination, as guaranteed by Article 1, Section 6 of the Constitution of the State of New York, and the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States, and would also violate Respondent's right to due process of law and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States."

that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession.

para. 10 (B): That in addition to and wholly apart from respondent's repeated refusal to testify and to produce his financial records, the said respondent SAMUEL SPEVACK wilfully and contumaciously obstructed and impeded the Additional Special Term by a course of conduct deliberately calculated to delay and mislead the Court sitting at such Additional Special Term, by his deliberate failure to appear on various adjourned dates and by authorizing and instructing counsel appearing on behalf of respondent at the Additional Special Term to make and give statements, representations and information to the Court, which statements, representations and information were untrue, whereby both the Court and counsel for respondent SAMUEL SPEVACK were deceived.

At the outset of the hearing before me (S.M. 8), petitioner stated he was limiting his proof to the aforesaid charges alleged in paragraphs 10 (A) and 10 (B) of the petition. Petitioner stated he would offer no evidence as to numerous charges alleged in other paragraphs of the petition, to wit: 10 (C) (failure to file statements regarding retainers), 10 (D) (filing false statements of retainer), 10 (E) (commingling clients' monies), 10 (F) (failure to keep records), 10 (G) (failure to submit closing statements), 10 (H) (preparation of false bills of particulars), 10 (I) (division of fees with attorneys who did not perform legal services), and 10 (J) (representing conflicting interests). All these other charges had been denied by the answer (ans., para. 7).

The Hearing Before Me

The hearing before me was brief. Petitioner offered in [fol. 183] evidence, without objection by respondent, the

transcript of the proceedings before the Additional Special Term of the Supreme Court, Kings County with respect to the inquiry into respondent's conduct, and various documents referred to in that transcript (Pet.'s Exh. 2 - 11; S.M. 8-9; S.M. 145-160).

Petitioner also offered in evidence, again without objection by respondent, more than one thousand statements of retainer filed by respondent with the Appellate Division from 1953 through the first six months of 1960 (S.M. 3-7; Pet.'s Exh. 1). Respondent conceded he was engaged to a substantial extent in the practice of personal injury and property damage cases on a contingent fee basis (S.M. 6).

When petitioner called respondent to testify in the hearing before me, respondent acknowledged he was the respondent in the proceeding and that he was admitted to the bar in 1926 (S.M. 164). However, upon being asked whether after his admission he engaged in the practice of law, respondent stated:

"I respectfully refuse to answer any questions other than that which I have already answered, first reiterating the constitutional privileges guaranteed by the United States Constitution and by the Constitution of the State of New York which I have heretofore asserted on several occasions, and I now more specifically respectfully refuse to answer the question on the ground that my answer might tend to degrade or incriminate me, or subject me to a forfeiture or a penalty. I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6, of the Constitution of the State of New York and the Fifth Amendment and the 14th Amendment of the Constitution of the United States. I respectfully invoke my right to due process of law and the equal protection of the laws under the 14th Amendment of the Constitution of the United States." (S.M. 164-165).

Respondent testified he would give the above answer to any question petitioner intended to put (S.M. 165).

Although respondent thus refused to testify before me as well as before the Inquiry, I do not construe the petition as raising any question that this refusal constituted some further or additional misconduct by respondent. Petitioner did not seek to amend the petition to add any further charge based on respondent's actions at the hearing before me nor did petitioner make any offer of proof as to what questions he desired to ask respondent at the hearing before me. Accordingly, I am directing my attention to respondent's conduct before the Inquiry, not his conduct before me.

[fol. 184] Respondent offered no evidence at the hearing before me (S.M. 166). He did move to dismiss the petition on the ground that the allegations therein and the proof offered did not constitute a legal basis for disciplinary action (S.M. 166-167). I denied this motion (S.M. 178). In so denying I did not presume to pass on the substantive issue of the sufficiency of the petition and the proof herein in the light of various constitutional arguments raised by respondent. I was merely taking the view that, as a matter of procedure, the constitutional issues are for the Appellate Division and not me to decide.

The Charge of Wilfully and Contumaciously Obstructing and Impeding the Additional Special Term

It will be convenient to first discuss this charge which is alleged in paragraph 10 (B) of the petition and involves—as I see it—primarily questions of fact. As will hereafter appear, the charge alleged in paragraph 10 (A) poses a legal question with constitutional ramifications which, as I construe the order of reference, is for the Appellate Division and not me to decide.

The petition alleges (para. 10 (B)):

"That in addition to and wholly apart from respondent's repeated refusal to testify and to produce his financial records, the said respondent SAMUEL SPEVACK wilfully and contumaciously obstructed and impeded

the Additional Special Term by a course of conduct deliberately calculated to delay and mislead the Court sitting at such Additional Special Term, by his deliberate failure to appear on various adjourned dates and by authorizing and instructing counsel appearing on behalf of respondent at the Additional Special Term to make and give statements, representations and information to the Court, which statements, representations and information were untrue, whereby both the Court and counsel for respondent SAMUEL SPEVACK were deceived."

The charge alleged in paragraph 10 (B), as I read it, is a charge of professional misconduct which raises no constitutional issue. As framed by petitioner, the charge in paragraph 10 (B) does not at all involve respondent's refusals to testify or produce his records. It asserts that, "in addition to *and wholly apart from* respondent's repeated refusal to testify and to produce his financial records" (emphasis supplied), respondent "wilfully and contumaciously obstructed and impeded the Additional Special Term". [fol. 185] This wilful and contumacious obstructing and impeding by respondent is alleged by paragraph 10 (B) to have consisted of (1) "a course of conduct deliberately calculated to delay and mislead" the Additional Special Term; (2) "deliberate failure to appear on various adjourned dates"; and (3) "authorizing and instructing" his counsel to make and give untrue statements, representations and information, whereby both the Court and respondent's counsel were deceived. The aforesaid conduct, "wholly apart from" respondent's refusal to testify and produce records, is claimed by petitioner to have occurred and to have constituted wilful and contumacious obstructing and impeding of the Additional Special Term.

I find the allegations of paragraph 10 (B) not proved by a fair preponderance of the evidence. To demonstrate this failure of proof it is necessary to trace in considerable detail the proceedings before the Judicial Inquiry.

The first hearing occurred on June 12, 1958 after the subpoena of June 2, 1958 was issued for the production of respondent's financial records relative to his business as an attorney (S.M. 9; Pet.'s Exh. 11). Respondent appeared personally and stated he had not had an opportunity to decide what position he would take (S.M. 13, 17-18). The Court, *without objection by counsel for the Inquiry*, gave respondent until June 17th to decide (S.M. 18-19).

On June 17, 1958 respondent and his attorney, David T. Berman, Esq., appeared (S.M. 19). Mr. Berman stated he was originally called into the matter on June 15th and requested an adjournment until June 24, 1958 (S.M. 19-20). *Counsel for the inquiry stated he had no objection* (S.M. 21). Mr. Berman said he "hope[d] to be able" on June 24th to give a statement as to respondent's position but the adjournment was not conditioned on that being done (S.M. 21-22).

At the hearing on June 24, 1958 Mr. Berman appeared and stated he had an application pending before the Appellate Division for relief against the subpoena (S.M. 22). At Mr. Berman's request, and *on the statement of counsel* [fol. 186] *for the Inquiry that he had "no objection" and "would go along with an adjournment without date"* to await a decision of the Appellate Division, the matter was adjourned without date (S.M. 23-24).

The next hearing, which did not directly involve respondent, occurred on November 14, 1958 and related to a subpoena duces tecum served on a bank for the records of respondent's accounts (S.M. 25, 32). The bank's attorney requested an adjournment, and an adjournment was granted to December 1st (S.M. 25-26, 29). Respondent's attorney, Mr. Berman, asked that the return of the bank subpoena be adjourned a week to give him an opportunity to seek an order vacating it (S.M. 33-34). The Court gave him the week, *without objection from counsel for the Inquiry* (S.M. 35-36).

On December 2, 1958 the return date of the bank subpoena was adjourned without date, *at the request of counsel*

for the Inquiry, until a decision was forthcoming from the Appellate Division on a motion made by Mr. Berman to vacate the bank subpoena (S.M. 36-37).

The next hearing took place over six months later, on June 15, 1959, with both respondent and Mr. Berman present (S.M. 37-38). At that hearing counsel for the Inquiry pointed out that respondent's motion to vacate the subpoena covering his records had been denied by the Appellate Division on July 21, 1958; that on October 20, 1958 the Appellate Division had denied reargument, leave to appeal, and a stay; that the Court of Appeals had denied leave to appeal on January 15, 1959; and that the United States Supreme Court had denied certiorari on June 1, 1959 (S.M. 37-38).

So far as appears, no attempt was made by the Inquiry to compel compliance with the subpoena for respondent's records while these various appeals were in process. This was consistent with the attitude, above referred to, taken by the Additional Special Term at the June 24, 1958 hearing when it adjourned the matter "without date" pending a determination of respondent's motion for relief against the subpoena.

It seems evident from the foregoing that, at least up to June 15, 1959, respondent had done nothing which could be regarded as wilful and contumacious obstructing or im- [fol. 187] peding of the Inquiry. Respondent or his counsel had appeared at every hearing. Respondent had employed recognized legal procedures to test the validity of the subpoenas directed to him and to the bank. There is nothing in the record from which I can reasonably conclude that his tests were sham or frivolous. Indeed, the fact that the Additional Special Term, with no objection by counsel for the Inquiry, adjourned respondent's matter "without date" pending a decision on the challenge to the subpoena for his records, and that, so far as appears, there was no attempt by the Inquiry to enforce the subpoena while respondent was exhausting his remedies all the way to the United States

Supreme Court, suggests that respondent's motion to vacate raised bona fide issues.

At the June 15th, 1959 hearing respondent's counsel, Mr. Berman, requested a brief adjournment (S.M. 40-45). He stated at that time that, if respondent took the stand, "constitutional privileges or rights or protection may be invoked" (S.M. 44). *Counsel for the Inquiry agreed to an adjournment to June 19, 1959,* although with reluctance (S.M. 45-46).

Respondent appeared personally on June 19, 1959 but Mr. Berman did not because of his wife's illness (S.M. 46). *Apparently by agreement between Mr. Berman and counsel for the Inquiry* the matter was put over to June 26, 1959 (S.M. 46-47).

On June 26, 1959 respondent and Mr. Berman appeared (S.M. 47). Mr. Berman stated his contention that the motion to vacate the subpoena had been denied on the ground of prematurity (S.M. 48-49). He asked an adjournment until determination of any appeal from a denial by the Court of a motion to vacate a subpoena in another case (S.M. 49-50). The Court denied this application (S.M. 50).

Respondent was then questioned by counsel for the Inquiry (S.M. 52). Respondent's counsel conceded that the equivalent of service of the subpoena had been made on respondent (S.M. 53). On advice of counsel respondent declined, however, to produce the subpoenaed records on the ground that "production may tend to incriminate or degrade me or to subject me to some penalty or forfeiture" [fol. 188] (S.M. 59-61, 69). The Court commented that respondent had "a perfect right" to plead this constitutional privilege (S.M. 71).

At this point the Court, sua sponte, advised respondent that the Inquiry was preparing a test case based upon the refusal of a witness to answer questions on constitutional grounds, and that it was "the thought in some quarters that such an attitude . . . might be indicative of such a lack of candor . . . as to warrant disciplinary proceedings based upon that ground alone" (S.M. 61-62). The Court also

stated, *and counsel for the Inquiry agreed*, that, if the "test case" resulted in a determination by the Appellate Division that the refusal to answer questions warranted disbarment, respondent "would be given a full opportunity to come back here with your records and to testify" (S.M. 73-75). Respondent's counsel then asked if respondent was "excused from further appearance", and the Court said "Yes" (S.M. 75).

So far as appears, nothing more occurred in respondent's case for over two years. The *Cohen* case—the "test case" referred to at the June 26, 1959 hearing—was decided by the United States Supreme Court on April 24, 1961 (S.M. 102). *Cohen* v. *Hurley*, 366 U.S. 117, 6 L. Ed. 2d 156 (1961). The Supreme Court in the *Cohen* case held, five to four, that New York's disbarment of an attorney who invoked his state privilege against self-incrimination in the course of the Inquiry did not violate the Fourteenth Amendment. Following the decision in the *Cohen* case, respondent, under date of June 29, 1961, wrote to Justice Baker of the Additional Special Term asking whether the Justice would consider an application for permission to appear (Pet.'s Exh. 3; S.M. 145-146). Under date of July 6, 1961 respondent's attorney, Mr. Berman, forwarded to Justice Baker another letter from respondent, dated July 6, 1961, wherein respondent said: "In view of the recent decision by the Supreme Court of the United States in the Cohen matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before Your Honor * * *. I am willing to testify and answer questions concerning relevant matters" (Pet.'s Exh. 4; S.M. 146-148).

[fol. 189] Under date of July 26, 1961 Justice Baker wrote to respondent, stating "Since the members of the Inquiry staff are now engaged in other matters requiring their full attention, I am unable at this time to fix a specific date for your return. I shall do so at the earliest possible opportunity, and notify Mr. Berman, so that a date convenient to all may be arranged" (Pet.'s Exh. 5, S.M. 149-151).

Under date of August 28, 1961 counsel for the Inquiry notified Mr. Berman that Justice Baker had set respon-

dent's matter on a call calendar for September 5, 1961, and that "At that time, a definite date will be fixed for a hearing" (Pet.'s Exh. 6, S.M. 151-152). Counsel for the Inquiry further stated: "On September 5th, [respondent] is expected to produce and deliver to the Inquiry for examination all of his financial records as previously subpoenaed. [Respondent] should be present in order to testify to the keeping and identity of such financial records" (Pet.'s Exh. 6, S.M. 152).

It appears, therefore, that, up to this point at least, respondent had not been guilty of wilfully and contumaciously obstructing and impeding the Inquiry. He had resisted the subpoena directed to his records, and, so far as appears, the Inquiry had voluntarily refrained from pursuing the matter while respondent's resistance was litigated up to the United States Supreme Court. Then, when the subpoena was upheld, respondent had asserted his constitutional privilege against turning over the records. There is no claim in the petition and no evidence before me from which I can conclude that this assertion of the privilege was a sham or a pretense or that the privilege was invoked more extensively than reasonably required to protect respondent against incrimination. Indeed, as previously noted, the Additional Special Term commented that respondent had "a perfect right" to plead the privilege (S.M. 71).

Respondent had been advised by the Court, after he asserted the privilege, that the Inquiry was preparing a "test case" on the question whether refusal to answer questions would be indicative of a lack of candor warranting disbarment, and he had been told by the Court, with the con- [fol. 190] currence of counsel for the Inquiry, that he would be given a "full opportunity" to come back with his records and testify if the "test case" resulted in a determination adverse to his position (S.M. 61-62, 73-75). The Court had stated that there was "a very serious question to be determined in connection with" the test case (S.M. 62). In the meantime it had "excused" respondent "from further appearance" (S.M. 75).

When the test case—i.e., the *Cohen* case—was decided adverse to respondent's position, respondent was given the opportunity he had been promised to come back and testify. If respondent had availed himself of that opportunity, turned over his records, and testified, presumably no one would have claimed that his prior actions constituted professional misconduct.

It seems, therefore, that the claim in paragraph 10 (B) that respondent, "wholly apart from" his refusal to testify and produce his records, wilfully and contumaciously obstructed and impeded the Inquiry must be sustained—if at all—on what respondent did *after* he was given the promised further opportunity to produce his records subsequent to the decision in the *Cohen* test case. It is my opinion that his subsequent actions do not sustain the charge in paragraph 10 (B).

September 5, 1961, it will be recalled, was the date initially set by the Inquiry for respondent's further opportunity to produce his records. On that date respondent's attorney, Mr. Berman, appeared and requested an adjournment on the ground that respondent was unable to attend by virtue of other court engagements (S.M. 76-77; Pet.'s Exh. 7; S.M. 152-155). Counsel for the Inquiry stated he would like to suit respondent's convenience, and, *on the agreement of counsel for the Inquiry,* the matter was adjourned to October 2, 1961 (S.M. 77). After the adjournment was granted, counsel for the Inquiry asked whether respondent intended to raise a question about turning over the financial records (S.M. 77-78). Mr. Berman replied "Not per se any objection. It is just that some of the items in question do not exist and never existed" (S.M. 77-78). [fol. 191] Under date of September 27, 1961 counsel for the Inquiry advised Mr. Berman that it would be necessary for respondent to be present on October 2nd with his financial records in order that they might be properly identified (Pet.'s Exh. 8; S.M. 156).

On October 2, 1961 Mr. Berman appeared without respondent and requested a one week adjournment on the

ground that October 2nd was a holy day of the Hebrew faith which respondent observed (S.M. 81-82). Mr. Berman stated he was empowered to say that *counsel for the Inquiry had no objection to the adjournment*, and the Court granted it (S.M. 82-83). After the adjournment had been granted, counsel for the Inquiry asked the Court if it would be advisable for Mr. Berman to state what position, if any, respondent would take on the adjourned date in connection with the records (S.M. 83). Mr. Berman replied that the books would be produced (S.M. 83). He specifically noted, however, that he could not "commit an individual to give up rights, whether they are under the Constitution or under the Statute" (S.M. 89).

On October 9, 1961 Mr. Berman appeared, apparently without respondent (S.M. 90). He asked the Court to relieve him from all further responsibility in the matter (S.M. 90-91). He stated that he was to be replaced by Bernard Shatzkin, Esq., and requested an adjournment for three weeks so that Mr. Shatzkin could adequately advise respondent (S.M. 90-91). Counsel for the Inquiry objected to an adjournment for that period but *agreed to an adjournment* until October 23rd (S.M. 92).

Under date of October 9, 1961 counsel for the Inquiry advised Mr. Shatzkin by letter that he was "requested" to appear, along with respondent, on October 23rd, and that respondent "must have with him the records, books and documents called for by the subpoena" (S.M. 157-158).

On October 23, 1961 Mr. Shatzkin, respondent's new counsel, appeared (S.M. 94). Respondent did not. Mr. Shatzkin requested a month's adjournment on the basis that, because of the press of other matters, he had not had the opportunity to acquaint himself with some of the background of the case (S.M. 95-96). Counsel for the Inquiry opposed an adjournment for this length of time and suggested that [fol. 192] "no more than a few days be given" (S.M. 96). In response to the Court's inquiry, Mr. Shatzkin stated "we intend to produce the records called for by the subpoena" (S.M. 97). The Court thereupon adjourned the matter un-

til December 4th, commenting that *"I don't see that we will be prejudiced in any way by granting the application counsel makes for an adjournment"* (S.M. 98) (emphasis supplied).

On December 4, 1961 Mr. Shatzkin appeared; respondent did not (S.M. 98). Counsel for the inquiry alluded to the failure of respondent to appear personally but did not make any particular point of the matter (S.M. 102-103). It should be noted in this connection that, although petitioner asserts, in paragraph 10 (B) of the petition, that respondent's allegedly wilful and contumacious obstructing and impeding of the Inquiry consisted in part of "deliberate failure to appear on various adjourned dates", this December 4th instance appears to be the only occasion in the course of the many hearings where counsel for the Inquiry made the point that respondent had appeared by counsel rather than personally. The Court never admonished respondent or his counsel because of respondent's failures to appear personally, never warned respondent or his counsel that such conduct might be deemed contumacious, and never made any direction that respondent attend all hearings personally. Under such circumstances I fail to see how a charge of professional misconduct can be spelled out of the failure of respondent to appear in person at hearings. Respondent or his counsel, or both, appeared at every scheduled hearing, so far as the record shows, and the failure of respondent to personally attend each hearing never seems to have been regarded as significant by the Additional Special Term.

At the December 4, 1961 hearing Mr. Shatzkin informed the Court that, since the October 23rd hearing, he had been practically incessantly engaged in bus negotiations with the Transport Workers Union and the City (S.M. 99). He requested an adjournment for approximately a month (S.M. 101). Counsel for the Inquiry "strongly" opposed the adjournment (S.M. 101). The Court asked Mr. Shatzkin whether it wouldn't be fair to state whether or not respon- [fol. 193] dent intended to comply with the subpoena (S.M.

103). Mr. Shatzkin replied: "* * * This is not a matter that is easy of determination. * * * [respondent's] position as to what he was going to do and what he will do has changed now a dozen times, and a great many of the changes have been predicated on the very difficulty that this whole question has posed apparently not only for this Court and the Appellate Division, but also for the Court of Appeals and the United States Supreme Court * * *" (S.M. 103-104).

Mr. Shatzkin urged that "we not be obliged to take a position at this time" (S.M. 105). The Court then ruled it would grant an adjournment to January 10, 1962 "but it has got to be the last" (S.M. 105-106). The Court informed Mr. Shatzkin that on January 10th he *"must make a decision one way or the other"* (S.M. 106; emphasis supplied).

Under date of January 4, 1962 counsel for the Inquiry advised Mr. Shatzkin by letter that at the January 10th hearing respondent "must have with him the records, books and documents called for by the subpoena" (S.M. 158-159). He also quoted in that letter the colloquy at the December 4, 1961 hearing wherein, as above noted, the Court had stated that the January 10th adjournment "has got to be the last one" and that on that day respondent "must make a decision one way or the other" (S.M. 159-160).

On January 10, 1962 respondent and Mr. Shatzkin appeared (S.M. 106). Mr. Shatzkin informed the Court that respondent had applied for an order to obtain access to those disciplinary proceedings in the past five years where the charges were not sustained (S.M. 106-110). Mr. Shatzkin requested that respondent's matter be put over until such time as the Appellate Division passed on this application (S.M. 110). The Court indicated its unwillingness to do so (S.M. 110-113) whereupon Mr. Shatzkin stated: "* * * I think I should apprise the Court of the fact at this time that in the event my application to wait until the Appellate Division makes its determination is denied, that

my client has been advised by me that in my opinion he should assert his constitutional privileges * * *" (S.M. 114).

[fol. 194] Respondent was then called to testify. He answered "Yes" when asked by counsel for the Inquiry if he had been served with a subpoena in June of 1958 for certain financial records (S.M. 115). He was next asked whether he wished to withdraw the privilege of self-incrimination which he had previously invoked, and, upon advice of counsel, replied:

> "* * * I respectfully would be obliged not to produce any of the records or to answer any questions in relation thereto on the ground that the answers might tend to degrade or incriminate me or subject me to a forfeiture or a penalty, * * * I respectfully claim the constitutional privilege against self-incrimination as guaranteed by Article 1, Section 6 of the Constitution of the State of New York, and also the constitutional privilege accorded by both the Fifth Amendment and the 14th Amendment of the Constitution of the United States" (S.M. 117).

Respondent went on to state that he also took a position, on the advice of counsel, under the Fourteenth Amendment with respect to fundamental fairness and claimed the subpoena was far too broad in relation to fairness (S.M. 117-118). He also invoked due process of law and the equal protection of the law under the Fourteenth Amendment (S.M. 118). He indicated his answer would be the same with respect to requests to produce specific records named in the subpoena (S.M. 118-119).

On June 27, 1962 Mr. Shatzkin was granted an adjournment until July 9, 1962 *over the objection of counsel for the Inquiry* (S.M. 138-139).

At the final hearing before the Inquiry, on July 9, 1962, respondent added to the constitutional privileges previously asserted the privilege against unreasonable searches and seizures in the Fourth Amendment to the United States

Constitution and the similar privilege afforded by Article 1, Section 12 of the New York Constitution (S.M. 139, 143-144).

After making a careful examination of the aforesaid proceedings before the Additional Special Term, I am constrained to conclude it would be speculation, conjecture, and surmise to infer—as petitioner alleges in paragraph 10 (B) of the petition—that respondent "wilfully and contumaciously obstructed and impeded the Additional Special Term" by "a course of conduct deliberately calculated to delay and mislead" the Additional Special Term, by "deliberate failure to appear on various adjourned dates", and "by authorizing and instructing" his counsel to make and give untrue statements, representations and information to the Court, whereby both the Court and respondent's [fol. 195] counsel were deceived.

I have already pointed out that the delay in the proceedings before the Additional Special Term from the first hearing in June, 1958 until the hearing in June, 1959, at which respondent first invoked his self-incrimination privilege, was countenanced by the Court and by counsel for the Inquiry and was due, in the main, to the fact that a challenge to the subpoena for respondent's records was being litigated in the courts. Everyone concerned seems to have been content to let the matter lie dormant while that challenge, which all seem to have treated as bona fide, was decided.

Similarly, the delay from the hearing in June, 1959 to the hearing in September, 1961, after the decision in the *Cohen* test case, seems to have been likewise countenanced by the Court and by counsel for the Inquiry. The Court, on its own motion, had told respondent that there was a "very serious question to be determined"—to wit, whether a lawyer could be disciplined for lack of candor on the basis of invoking his constitutional privilege; that the Inquiry was, therefore, preparing a "test case"; that, if the decision in the test case proved adverse to respondent's position, he would be given a "full opportunity" to come back with his

records and testify; and that, in the meantime, he was "excused from further appearance" (S.M. 61-62, 73-75).

It seems apparent that the Additional Special Term and counsel for the Inquiry believed that a very serious constitutional issue was presented, and that, therefore, it was not fair to compel respondent to make up his mind whether to testify or not until the test case had been decided. Respondent did not maneuver or mislead the Additional Special Term into taking this position. The Additional Special Term did so on its own, with the concurrence of counsel for the Inquiry (S.M. 61-62, 73-75).

Nor do I find that respondent's actions subsequent to the decision in the *Cohen* case amounted, as paragraph 10 (B) of the petition alleges, to a wilful and contumacious obstructing and impeding of the Additional Special Term by a course of conduct deliberately calculated to delay and mislead it or by a deliberate failure to appear or by au-
[fol. 196] thorizing or instructing his counsel to make or give untrue statements, representations or information to the Court.

As heretofore pointed out, the claim of obstructing and impeding in paragraph 10 (B) of the petition based on deliberate failure of respondent to appear at hearings is not supported by the evidence. Respondent or his attorney appeared at every hearing and no one ever made any substantial point of the failure of respondent to personally appear at each hearing.

The further claims in paragraph 10 (B) of the petition that respondent obstructed and impeded the Additional Special Term by "a course of conduct deliberately calculated to delay and mislead" and by "authorizing and instructing his counsel to make and give untrue statements, representations and information to the Court" are also unsupported by the preponderance of the evidence.

As heretofore shown, nothing done by respondent prior to the decision in the *Cohen* case supports these claims which, bear in mind, are not at all premised on respondent's refusal to testify and produce records but on conduct

"wholly apart from" such refusal. I also find nothing in respondent's conduct subsequent to the decision in the *Cohen* case to sustain these claims.

It is true that respondent, under date of July 6, 1961, after the *Cohen* decision had come down, informed Justice Baker that he "wished" to withdraw his constitutional privilege and was "willing" to testify (Pet.'s Exh. 4; S.M. 146-148). It is also true that, six months later, on January 10, 1962, respondent, on the advice of counsel, asserted the privilege again and refused to testify (S.M. 117-119).

If respondent did so in a deliberate effort to delay or mislead the Additional Special Term, it would certainly have been unprofessional conduct. However, I do not believe the preponderance of the evidence points to a conclusion that respondent was guilty of such deliberate delay or misleading.

Respondent, after the *Cohen* case, was unquestionably placed in a difficult position. That case, on first reading at least, seemed to mean that respondent had to produce his records or face professional discipline, including the [fol. 197] possibility of disbarment. Presumably this was the interpretation put on the *Cohen* case in June and July of 1961 by respondent and his then counsel, Mr. Berman, and accordingly they determined it was best for respondent to produce his records. Thereafter, however, respondent obtained new counsel, Mr. Shatzkin, and Mr. Shatzkin advised respondent to continue to assert his privilege. Mr. Shatzkin was, and is, evidently of the opinion that the *Cohen* case did not, and does not, leave respondent with the alternative of production of records or professional discipline. Indeed, Mr. Shatzkin submitted a 77 page brief to me wherein he argues, in effect, that the *Cohen* case is no longer good law in view of the fact that the Supreme Court, in flat contradiction of its holding in *Cohen*, has now decided that the Fifth Amendment applies to the states through the Fourteenth Amendment. *Malloy* v. *Hogan*, 278 U.S. 1, 12 L. Ed. 2d 653 (1964).

As is well known, the meaning from time to time attached by the United States Supreme Court to the scope and ex-

tent of constitutional rights has been subject to great fluctuation in recent years. When the nation's highest tribunal so frequently divides five to four on such matters, as it did in the *Cohen* and *Malloy* cases, lawyers may be pardoned when they too disagree as to the effect of a holding by that bench.

I cannot read respondent's heart, anymore than any fact finder can. Unquestionably there is a *possibility* that, at the time, in July of 1961, when respondent told Justice Baker he wished to withdraw his constitutional privilege, he was doing so with the fraudulent intention of not carrying through on the withdrawal. There is nothing in the record, however, to *prove* that respondent then had this fraudulent intention except for the fact that respondent did not thereafter withdraw the privilege.

A mere failure to carry out a commitment is, of course, insufficient evidence that one had a fraudulent intention to dishonor the commitment when he made it. If such a failure were adequate evidence of fraud, every breach of contract would be automatically a tortious deceit. Petitioner here, like any plaintiff, had the burden of proof. I find petitioner [fol. 198] failed to sustain the burden of showing that respondent never intended to carry through on the statement made to Justice Baker in the letter of July 6, 1961.

It should be noted, moreover, that the Court and counsel for the Inquiry seem, in fact, not to have been misled or prejudiced—at least not substantially so—by respondent's statement to Justice Baker in July, 1961 indicating he wished to withdraw the privilege or by the subsequent statements of respondent's counsels to like effect. Thus, in the very first hearing after respondent's letter to Justice Baker, to wit, the hearing of September 5, 1961, counsel for the Inquiry asked whether respondent intended to raise a question about turning over the records (S.M. 77-78). Although respondent's counsel, Mr. Berman, replied—doubtless in entire good faith—that there would not "per se" be any objection (S.M. 77-78), counsel for the Inquiry did not take this assurance at face value. Thus, at the next hearing on October 2, 1961, counsel for the Inquiry

again asked what position respondent would take (S.M. 83). Although Mr. Berman, in reply, reiterated that the books would be produced, he added that he could not "commit" respondent to give up his rights "whether they are under the Constitution or under the Statute" (S.M. 83, 89).

It is apparent, therefore, that counsel for the Inquiry never treated respondent's letter of July 5, 1961 as a firm assurance that the records would be produced and was on notice as early as October 2, 1961 that respondent's then counsel, Mr. Berman, was not committing respondent to give up his Constitutional rights.

It is true that Mr. Shatzkin, respondent's new counsel, stated on October 23rd—the first hearing Mr. Shatzkin attended—that "we intend to produce the records called for by the subpoena" (S.M. 97). This was in response to an inquiry by the Court (S.M. 97). Mr. Shatzkin made clear, however, that he had not at that time fully acquainted himself with the case (S.M. 95-96), and, at the next hearing—that of December 4, 1961—Mr. Shatzkin urged that "we not be obliged to take a position [on producing the records] at this time" because "This is not a matter that is easy of [fol. 199] determination" (S.M. 103-105). The Court recognized Mr. Shatzkin's problem. It agreed that "It [to wit, taking a position] is a difficult thing to do" and accordingly granted a "last" adjournment to January 10, 1962 on which day it stated Mr. Shatzkin would have to "make a decision one way or the other" (S.M. 105-106). On January 10th, of course, respondent did made a decision and reasserted his privilege (S.M. 117).

My conclusion as to what probably happened between July 6, 1961, when respondent indicated he wished to withdraw his privilege and January 10, 1962 when he reasserted it, is that respondent was wavering in his own mind as to what he ought to do; that Mr. Berman and, later, Mr. Shatzkin were likewise uncertain; that this wavering and uncertainty accounts for the conflicting statements to the Court; that the statements to the Court were not deliberately falsified; and that counsel for the Inquiry was not in reality misled because such counsel always recognized that

respondent might not carry through on his July 6th statement about withdrawing the privilege. I find no proof by a preponderance of the evidence that respondent acted in bad faith, that he deliberately tried to delay or mislead the Additional Special Term, or that he authorized or instructed either of his counsels to make or give untrue statements, representations or information to the Court.

Accordingly, I find the charge in paragraph 10 (B) of the petition—which, I reiterate, claims professional misconduct "wholly apart from" respondent's refusal to testify and produce his financial records—not proved.

The Charge of Violating Respondent's Inherent Duty to the Legal Profession

The petition alleges (para. 10 (A)):

> "The refusal of the respondent SAMUEL SPEVACK to produce the records set forth in the subpoena duces tecum alleged in paragraph '5.' above and his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct [fol. 200] and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession."

This is the same charge involved in *Cohen* v. *Hurley*, 366 U.S. 117, 6 L. Ed. 2d 156 (1961). The language of the charge

is virtually the same as that in the *Cohen* case. See 366 U.S. at 121-122, 6 L. Ed. 2d at 160-161.

In considering this charge I am confronted at the outset by a question raised by petitioner as to the scope of the reference. According to petitioner, the affirmative defense raised by respondent, namely that his refusal under claim of constitutional privilege to answer questions and produce his records "cannot lawfully constitute a basis for disciplinary action" (ans., para. 9), is not before me. Petitioner asserts (his reply br., pp. 1-2) that "the only point upon which a finding of fact is to be made" by me is whether respondent refused to testify and produce his records, and that the "legal effect" of that refusal "is for the Appellate Division" to decide.

Respondent, on the other hand, has argued the constitutional issues before me at great length. It is respondent's basic position, as I understand it, that the *Cohen* case is no longer good law in view of the fact that the Supreme Court has since repudiated the premise of the majority opinion in *Cohen* that the Fifth Amendment did not apply to the states and that hence the states had great leeway in defining the reach of the privilege against self-incrimination, and the further premise of the majority opinion that a lawyer's only federal constitutional right, so far as self-incrimination in a Judicial Inquiry was concerned, was a right granted by the Fourteenth Amendment to be protected against "fundamental unfairness". According to respondent, since *Malloy* v. *Hogan*, 278 U.S. 1, 12 L. Ed. 2d 653 (1964) has made clear that the Fifth Amendment does not apply to the states, the views of the four dissenters in *Cohen*—which views were premised on the applicability of the Fifth Amendment—are now the law of the land.

I am constrained to agree with petitioner that these con- [fol. 201] stitutional issues are for the Appellate Division and not me to decide. My duty under the reference, so far as the charge in paragraph 10 (A) of the petition is concerned, is only to find what respondent did with respect to refusing to testify and produce records and not the legal effect of such refusal. I do not, therefore, pass on the

question whether respondent's refusal to testify and produce his records violated his inherent duty and obligation as a member of the legal profession, as alleged in paragraph 10 (A) of the petition. That question is inextricably bound up with the constitutional issues raised by respondent's affirmative defense, and resolution of those issues is not within my province.

All that is before me, then, is the question of fact whether respondent did refuse to testify and produce records under claim of constitutional privilege. The admissions in the answer and the uncontradicted evidence make it clear that he did do so. Indeed, there is no real dispute between the parties on the point.

Accordingly, I find, as matters of fact, that respondent, at the hearing before the Inquiry of June 26, 1959, refused to produce the subpoenaed records on the ground that such production might tend to incriminate or degrade him or to subject him to some penalty or forfeiture (S.M. 59-61, 69). I also find that, at the Inquiry hearing of January 10, 1962, respondent refused to produce such records or answer any questions in relation thereto, citing the privilege against self-incrimination accorded by Article 1, Section 6 of the Constitution of New York and the Fifth and Fourteenth Amendments of the United States Constitution; he then also claimed that the subpoena was so broad as to violate the Fourteenth Amendment's guarantee of fundamental fairness and invoked his right to due process of law and equal protection under the Fourteenth Amendment (S.M. 117-119).

I further find that, at the Inquiry hearing of July 9, 1962 respondent added to the constitutional privileges previously asserted the privilege against unreasonable searches and seizures afforded by the Fourth Amendment to the United States Constitution and the similar privilege af- [fol. 202] forded by Article 1, Section 12 of the New York Constitution (S.M. 139, 143-144). Finally, I find that at the hearing before me respondent refused on constitutional grounds to answer any questions other than that he was the respondent and was admitted to the bar in 1926

(S.M. 164-165). At such hearing he reiterated the constitutional privileges previously asserted, and specifically claimed the privilege against self-incrimination as guaranteed by Article 1, Section 6 of the New York Constitution and the Fifth and Fourteenth Amendments of the United States Constitution; he also invoked his right to due process and equal protection under the Fourteenth Amendment (S.M. 164-165).

This report is respectfully submitted, together with the exhibits and the transcript of testimony.

Harold F. McNiece, Referee.

Dated: Brooklyn, N. Y., October 21, 1964.

[fol. 203] [File endorsement omitted]

[fol. 204]

In the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

Present: Hon. Marcus G. Christ, Acting Presiding Justice, Arthur D. Brennan, L. Barron Hill, James D. Hopkins, A. David Benjamin, Justices.

In the Matter of Samuel Spevack, an Attorney.

Solomon A. Klein, Petitioner,

Samuel Spevack, Respondent.

Order of Disbarment—July 19, 1965

A proceeding having been instituted in this court upon the petition of Solomon A. Klein, verified the 8th day of July, 1963, in respect to Samuel Spevack, an attorney and counselor at law admitted in this department on March 3,

1926, petitioning for an order directing that the respondent Samuel Spevack, as an attorney and counselor at law, be disciplined upon the charges set forth in said petition, and why such other or further action upon the charges embodied in said petition, as justice may require, should not be had, and for such other and further relief as may be just and proper, and the respondent having filed an answer, and this court by order dated September 23, 1963 having referred the issues raised by the petition and the answer to Harold F. McNiece, Esq., as referee, for hearing and for a report setting forth his findings upon the issues, and the Referee, after holding an extensive hearing at which testimony was taken, having filed his report dated October 21, 1964 with this court on said date, together with the testimony and exhibits, and the petitioner having moved to confirm the Referee's report and for the imposition of an appropriate measure of discipline upon the respondent, by notice of motion, dated April 29, 1965.

Now on reading and filing said notice of motion, petition, answer, affidavit of Solomon A. Klein and memorandum of petitioner in support of motion to confirm report, affidavit of Bernard Shatzkin and memoranda of respondent in opposition to petitioner's motion, the report of the [fol. 205] Referee the testimony and exhibits, and all the papers filed herein, and the said motion having been submitted by Mr. Solomon A. Klein, petitioner appearing in person and submitted by Messrs. Shatzkin and Cooper of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered that the petitioner's motion to confirm the Referee's report be and the same hereby is granted; and it is further

Ordered that the report of the Referee and the Referee's findings be and the same hereby are confirmed; and it is further

Ordered that on the basis of the Referee's unchallenged finding that respondent refused to testify and to produce his records the respondent Samual Spevack be and he hereby is disbarred from practice as an attorney and counselor at law effective October 1, 1965; and it is further

Ordered that the name of Samuel Spevack be and the same hereby is struck from the roll of attorneys and counselors at law in the State of New York effective October 1, 1965; and it is further

Ordered that the said Samuel Spevack be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, and he is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law of its application or any advice in relation thereto effective October 1, 1965.

Enter: Joe J. Callahan, Clerk.

[fol. 206]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

OPINION—July 19, 1965

No. 1209

In the Matter of SAMUEL SPEVACK, an attorney,

SOLOMON A. KLEIN, petitioner,

SAMUEL SPEVACK, respondent.

This is a proceeding to discipline respondent, an attorney at law, for professional misconduct. The issues of fact were referred to a Referee for a hearing and for a report

setting forth his findings upon the issues. The Referee, after holding an extensive hearing, has filed his report setting forth findings which are partly in favor of the respondent and partly adverse to him. The petitioner now moves to confirm the Referee's report and for the imposition of an appropriate measure of discipline upon respondent.

While originally ten charges were made against respondent, only one survives for our consideration; further reference to this one surviving charge will be made below. As to eight of the charges, the petitioner offered no proof and has in effect abandoned them. As to the ninth charge, the Referee found that petitioner had failed to sustain the burden of proof and that respondent was not guilty.

The remaining tenth charge—the sole charge now in issue—is that respondent refused to honor a subpoena duces tecum duly served upon him, in that he had refused to produce his financial records and had refused to testify before the justice presiding at said Judicial Inquiry; and that such refusal constituted a breach of his inherent duty as an attorney and counselor at law to divulge to the court all pertinent information bearing upon his character and fitness and upon his conduct and practices as a lawyer. The learned Referee has found, and the respondent does not deny that, while at times he may have wavered in his refusal, his refusal finally became intransigent and absolute. [fol. 207] Respondent's sole defense is that his refusal was based on the ground that the production of his records and his testimony would tend to incriminate him; that he was entitled to rely on the relevant state and federal constitutional provisions protecting him against self-incrimination; and that as a matter of law such reliance on the constitutional provisions cannot be made the basis of any disciplinary action by this court.

Our view, as previously stated, is that a lawyer, like any other citizen, has an absolute right to invoke his constitutional privilege against self-incrimination and to refuse to supply the pertinent information; but that when a lawyer does so he fails in his inherent duty to the court to divulge all pertinent information necessary to show his

character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar (Matter of Cohen v. Hurley, 9 A D 2d 436, affd. 7 N Y 2d 488, affd. 366 U. S. 117, rehearing denied 374 U. S. 857, 379 U. S. 870). As we stated in Cohen (pp. 448-449):

> "To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to cooperate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar."

In our opinion, the doctrine which we enunciated in *Cohen* has been in no way undermined or impaired by any contrary holding in the subsequent case of Malloy v. Hogan (378 U. S. 1), as urged by respondent. In that case, the petitioner had been held in contempt and imprisoned in consequence of his refusal to answer questions on the ground that his testimony would tend to incriminate him. But the petitioner there was not a member of the bar and, of course, his right to retain his membership in the bar, despite his refusal, was in no way involved.

[fol. 208] Under the circumstances, this court has no alternative other than to disbar the respondent. If he elects to invoke his constitutional privilege against self incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar. To that doctrine this court must adhere.

Accordingly, the petitioner's motion to confirm the Referee's report is granted; the Referee's findings are confirmed; and, on the basis of his unchallenged finding that

respondent refused to testify and to produce his records, the respondent is disbarred and his name directed to be struck from the roll of attorneys and counselors at law in the State of New York, effective October 1, 1965.

Christ, Acting P.J., Brennan, Hill, Hopkins and Benjamin, JJ., concur.

[fol. 209]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

IN THE MATTER OF SAMUEL SPEVACK,
an Attorney, Appellant.

SOLOMON A. KLEIN, Respondent.

MEMORANDUM ORDER—Decided December 1, 1965

Order affirmed on the authority of *Cohen* v. *Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis* v. *United States*, 328 U. S. 582; *Shapiro* v. *United States*, 335 U. S. 1).

Concur: Chief Judge Desmond and Judges Dye, Van Voorhis, Burke, Scileppi and Bergan. Judge Fuld concurs in the following memorandum: Although I still adhere to the views I expressed in dissent in *Matter of Cohen (Hurley)* (7 N Y 2d 488, affd. *sub nom. Cohen* v. *Hurley*, 366 U. S. 117), I deem myself concluded by that decision and, accordingly, concur for affirmance. (But cf. *Malloy* v. *Hogan*, 378 U. S. 1.)

[fol. 210] Triple Certificate to foregoing paper (omitted in printing.)

[fol. 211]

No. 459

COURT OF APPEALS

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of December in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

REMITTITUR—December 1, 1965

[fol. 212]

2.

No. 459. 65

IN THE MATTER OF SAMUEL SPEVACK, an Attorney.

SOLOMON A. KLEIN, Respondent,

SAMUEL SPEVACK, Appellant.

Be it Remembered, That on the 3rd day of November in the year of our Lord one thousand nine hundred and sixty-five, Samuel Spevack, the appellant—in this cause, came here unto the Court of Appeals, by Shatzkin & Cooper, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Solomon A. Klein, the respondent—in said cause, afterwards appeared in said Court of Appeals pro se.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 213] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Bernard Shatzkin, of counsel for the appellant, and by Mr. Solomon A. Klein, pro se, for the respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed on the authority of *Cohen* v. *Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (*Davis* v. *United States,* 328 U. S. 582; *Shapiro* v. *United States,* 335 U. S. 1).

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law. [fol. 214] Therefore, it is considered that the said order be affirmed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 1, 1965.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

(Seal)

[fol. 215] In the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

Present, Hon. Marcus G. Christ, Acting Presiding Justice, Hon. Arthur D. Brennan, Hon. L. Barron Hill, Hon. James D. Hopkins, Hon. A. David Benjamin, *Justices*.

In the Matter of

SAMUEL SPEVACK, an attorney.

SOLOMON A. KLEIN, Respondent,

SAMUEL SPEVACK, Appellant.

ORDER ON REMITTITUR FROM COURT OF APPEALS—December 7, 1965

The above named Samuel Spevack, appellant in this proceeding having appealed to the Court of Appeals of the State of New York, from an order of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of said court on July 19, 1965, disbarring Samuel Spevack from practice as an attorney and counselor at law and directing that his name be struck from the roll of attorneys.

And the said appeal having been heard in the Court of Appeals, and after due deliberation the said Court of Appeals having ordered and adjudged that the order of this Court so appealed from be affirmed on the authority of Cohen v. Hurley (366 U.S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (Davis v. United States, 328 U.S. 582; Shapiro v. United States, 335 U.S. 1) and having further ordered that the record and proceedings be remitted to the Appellate Division of the

Supreme Court, Second Judicial Department, there to be proceeded upon according to law, and

Now on reading and filing the remittitur from the Court of Appeals of the State of New York, dated December 1, 1965, it is

Ordered that the order of the Court of Appeals of the State of New York, be and the same hereby is made the order of this Court.

Marcus G. Christ, Acting Presiding Justice.

[fol. 216] In the Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany.

Present, Hon. Charles S. Desmond, *Chief Judge, presiding.*

2 Mo. No. 27

In the Matter of

Samuel Spevack, an Attorney,

Solomon A. Klein, Respondent,

Samuel Spevack, Appellant.

Order Amending Remittitur—January 6, 1966

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended

that his disbarment, based upon his refusal to produce any of the records specified in the subpoena duces tecum, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights.

And the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Gearon Kimball, Deputy Clerk.

(Seal)

[fol. 217]

SUPREME COURT OF THE UNITED STATES

No. 944—October Term, 1965

SAMUEL SPEVACK, Petitioner,

v.

SOLOMON A. KLEIN.

ORDER ALLOWING CERTIORARI—March 21, 1966

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.